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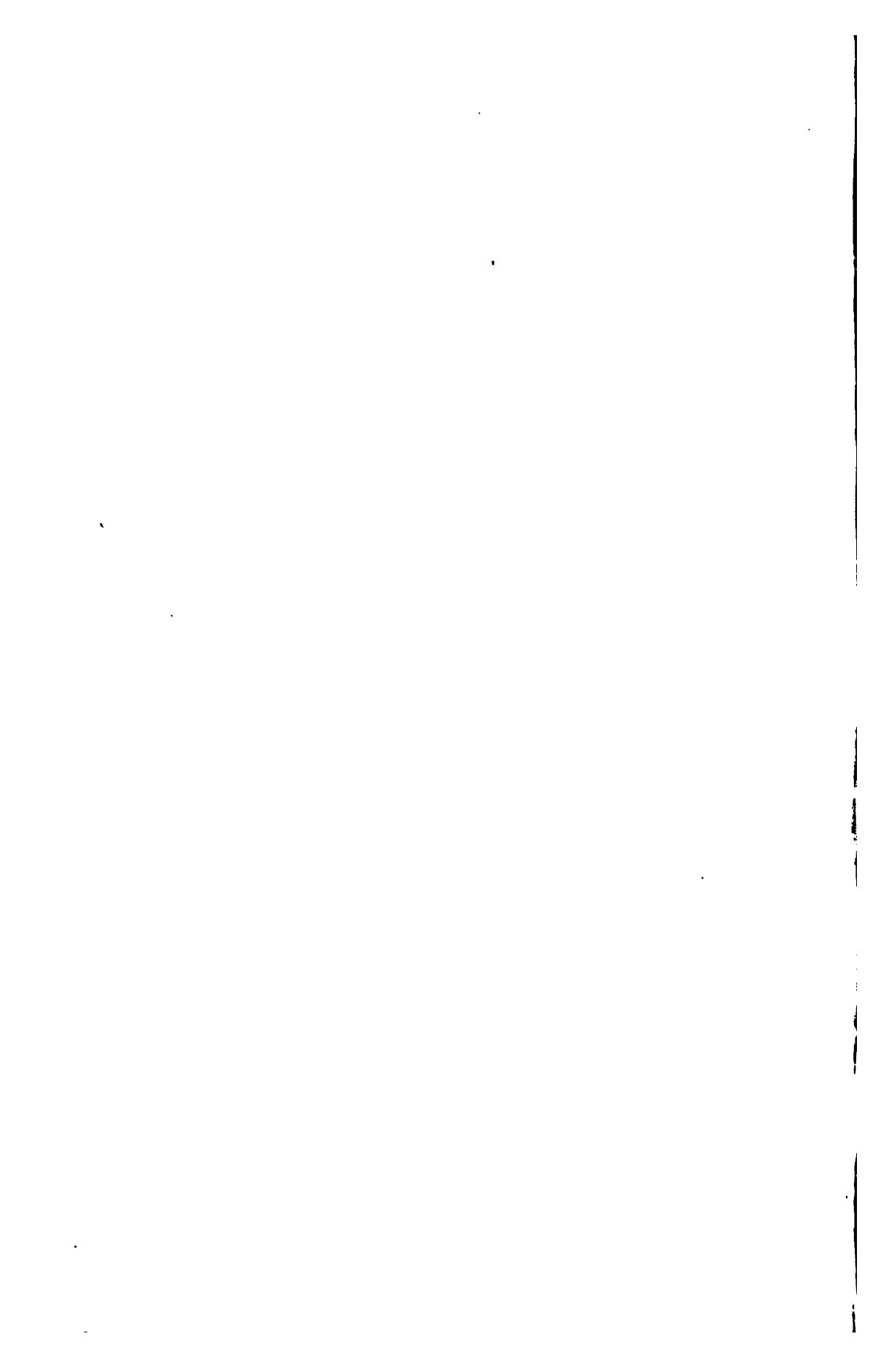
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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

THE SUPERIOR COURT

OF THE

CITY OF NEW-YORK.

BY JONA. PRESCOTT HALL,
COUNSELLOR AT LAW.

"Ne moy reproches maus cause, car mon entent est de bon amoure."
Motto to Brooke's Abridgment.

VOLUME II.

NEW-YORK :

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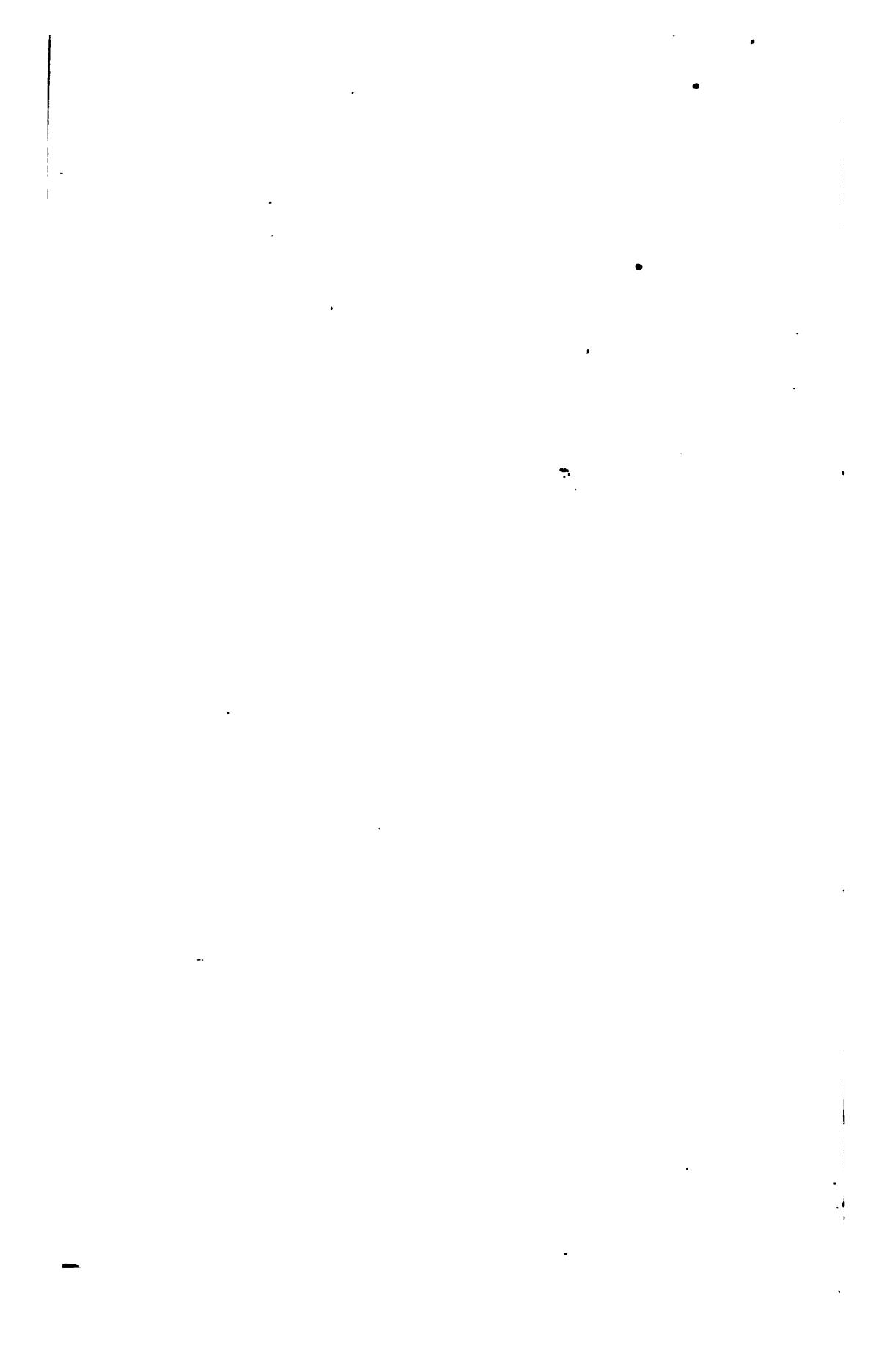
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Rec. May 27, 1875

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JUDGES
OF
THE SUPERIOR COURT
OF THE
CITY OF NEW-YORK,
DURING THE PERIOD OF
THE REPORTS CONTAINED IN THIS VOLUME.

SAMUEL JONES, Esq., Chief Justice.
JOSIAH OGDEN HOFFMAN, Esq., } Justices.
THOMAS J. OAKLEY, Esq., }



A

T A B L E

OF THE

N A M E S O F T H E C A S E S

.R E P O R T E D I N T H I S V O L U M E.

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CASES
ARGUED AND DETERMINED
IN THE
SUPERIOR COURT
OF THE
CITY OF NEW-YORK.

ZEBEDEE RING AND PETER McNAMARRA

versus

THOMAS FRANKLIN.

The registry of a vessel at the Custom House, although accompanied by the oath required by law of the person in whose name the registration is made, is not *conclusive* evidence that the ownership of such vessel is in him. The registry does not determine the ownership of the vessel, its object being merely to show her national character, and to secure the advantages belonging to vessels of the United States.

The mortgagee of a vessel out of possession, is not liable for repairs, unless they are made upon his credit, or by a special contract with him : and parole evidence is admissible to show, that the bill of sale whereby the vessel is conveyed, although *stamped* upon its face, was, nevertheless, intended as a mortgage. The agreement which operates as a defeasance, need not be under seal ; nor is it necessary that it should be made or executed simultaneously with the deed, in order to give it validity.

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The mortgagor of a vessel is a competent witness for the mortgagee, who is sued as owner, to show the nature of the transfer, and to prove that a conveyance, apparently absolute, was in fact conditional. His interest in the suit is balanced, and as the mortgagee, if liable at all, is liable, either as owner, or as mortgagee in possession, the mortgagor would not be responsible to him for costs, it being the duty of the mortgagee, under such circumstances, to pay for the repairs in the first instance, without suit.

ASSUMPSIT to recover the amount of a bill of repairs upon the ship Concordia. The declaration contained the usual counts for work, labour, and materials; a count for goods sold and delivered; the money counts; and a count upon an account stated. Plea, the general issue.

The cause was tried before Mr. Justice OAKLEY. At the trial, it appeared, that the repairs, for which the action was brought, were made between the 10th day of September, 1827, and the 5th of June, 1828; and no objection was made as to the items of the plaintiffs' account. The charges in the books of the plaintiffs, were against the "ship Concordia and owners," and the work and materials were furnished by the order of Samuel G. Bailey, the captain of that ship. While the vessel was receiving her repairs, one Nathaniel G. Minturn, (who it afterwards appeared was the owner of the ship, but had mortgaged her to the defendant,) was occasionally at the yard of the plaintiffs, and a bill of the repairs was rendered to him in the month of December, 1827, or in January, 1828. No bill was ever presented to the defendant; but Minturn had given his note to the plaintiffs for the amount of the repairs, and had become insolvent before the commencement of this action. The note, however, had never been paid by Minturn, and was produced in Court by the plaintiffs. The defendant, it also appeared, was never present while the repairs were in progress, nor was payment ever demanded of him; but Minturn had a general account with the plaintiffs for the repairs of the vessel. It further appeared from the plaintiffs' evidence, that the ship was registered on the 15th day of October, 1824, and that at the time of such registration, the defendant had made "affirmation," according to the act of Congress, that he was the "true and only owner" of said ship. It also appeared that

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no change had taken place in the ship's papers at the Custom-house, after the registry, although the act requires an oath or affirmation, similar to the above, upon every entry of the vessel. The ship had been conveyed to the defendant by Minturn, in the month of October, 1824, and had performed at least two voyages a year, ever since ; but Minturn had received her freight money, and she had sailed at his sole expense. It also appeared that the defendant had once offered to *sell* the vessel, and that in the month of August, 1828, he had refused to permit her to go upon a certain voyage.

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The defendant, on his part, produced the bill of sale whereby the vessel was transferred to him by Minturn, and then called Minturn himself as a witness. He was objected to by the counsel for the plaintiffs, as interested and incompetent ; but the objection was overruled by the Judge. Being sworn on his *voir dire*, he testified that he had no interest in the cause ; and being then sworn in chief, he testified, that on the 15th day of October, 1824, he was, and for a long time before, had been, the owner of said ship. On that day, he borrowed of Franklin and Minturn, (a firm of which the defendant was a partner,) the sum of \$6000, in their endorsements, and gave to the defendant the bill of sale in question, as collateral security for the loan. Afterwards, in the month of March, 1825, the defendant gave to Minturn a memorandum in writing, in which he acknowledged that he held the vessel as collateral security for said endorsements. This paper was produced at the trial by the witness, and the counsel for the plaintiffs objected to its being read. The objection was overruled, however, and the memorandum submitted to the jury.

The witness then further testified, that the defendant had never been in possession of the ship, and had never exercised any control over her in any way, except in the month of August, 1828, when he refused to permit her to go to sea until his claim was satisfied. The witness himself had alone exercised all the acts of ownership over the vessel, and it was at his request that the repairs were made, he having directed Bailey (the master) to cause them to be made. Jonas Minturn, the partner of the defendant,

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died in 1827, and after his death, the defendant paid the notes endorsed by their firm for the witness.

The defendant (the witness also testified) always held the bill of sale as *collateral security*, and the vessel had been sold by the *witness* to pay the demand of the defendant, who gave a bill of sale of her to the purchaser. The witness himself had always acted as the owner of said vessel, and he did not inform the plaintiffs, during the progress of the repairs, that she was held by the defendant as mortgagee.

The defendant also called Benjamin G. Minturn, as a witness, who testified that he was privy to the arrangement between the defendant and Nathaniel G. Minturn; that the vessel had always been held by the defendant as collateral security for said loan, and that the defendant had *never been in possession of her*, nor *acted as owner*. The vessel had always been in the possession of *Nathaniel G. Minturn*, and he had constantly acted as her owner. This evidence was also objected to by the plaintiffs' counsel.

The plaintiffs then proved, that it was not their practice always to make inquiries after the owners of a ship sent to them for repairs, but the bills were most frequently paid by the captains, who ordered the work to be done.

Upon this evidence, the Judge charged the jury, that if they believed the defendant was the absolute owner of the vessel, or the mortgagee thereof *in possession*, they ought to find a verdict for the plaintiffs; but if they believed that the defendant was a mortgagee merely, and out of possession, then their verdict should be for the defendant.

The jury returned a verdict for the defendant; and the counsel for the plaintiffs having excepted to the charge, moved for a new trial.

The cause was now argued by *Mr. P. W. Radcliffe*, for the plaintiffs, and by *Mr. J. Anthon* and *Mr. D. B. Ogden*, for the defendant.

For the plaintiffs, it was contended,

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I. That the bill of sale from Nathaniel G. Minturn to the defendant, being absolute, upon its face, parol proof ought not to have been admitted to explain, vary, or contradict it.

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II. The defendant having *sworn* at the Custom-house, that he was the *owner* of the vessel, and having taken the requisite oath each time when the vessel was cleared out and entered, and the register of the vessel being in his name, no evidence ought to have been admitted to explain, vary, or contradict the same.

III. That the bill of sale and oath taken by the defendant at the Custom-house, at the time of the transfer of the vessel to him, and the oaths taken by the defendant at the Custom-house, at each time of clearing out and entering the vessel, together with the register of the vessel in the name of the defendant, were conclusive evidence of the ownership of the defendant.

IV. That the memorandum given by the defendant to Nathaniel G. Minturn, ought not to have been read in evidence ; 1. because it was not under seal. 2. It was made subsequent to the bill of sale.

V. Nathaniel G. Minturn ought not to have been admitted as a witness. 1. Because the defendant could not show by him that the paper presented at the trial was intended and meant as a mortgage. 2. Because he was interested.

If the plaintiffs prevail, the witness will be compelled to pay a debt to the defendant, who is, according to his admission, a mere mortgagee. If that be so, then Franklin is a *trustee* for Minturn, and the latter will be liable to the former for all the consequences of this defence ; and if the plaintiffs recover, Minturn must pay the costs of this suit as well as the debt. If his interest in other respects is balanced, he is still interested as to the question of costs, and therefore incompetent. The competency or incompetency of a witness, does not depend on the *amount* of his interest in the event of the suit, but upon the fact, whether he is interested at all. Perhaps it may be said, that the facts sworn to by Minturn, were proved by the testimony of other witnesses. But

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this will not excuse the admission of an incompetent witness ; for the rule is settled, that if one incompetent witness be permitted to testify, there must be a new trial, even although fifty other witnesses may have sworn to the same facts. [*Marquand v. Webb*, 16 Johns. R. 93. *Hubly v. Brown*, *Ibid.* 70. *Phil. on Ev.* vol. I. 48, 54, 56. 2 *Day's Rep.* 399.]

VI. The defendant (even admitting that the paper, claimed to be a mortgage, was admissible, as evidence) had a right to the possession of said vessel at any time, the papers not prohibiting such possession. The evidence shows that the defendant had possession of the vessel, and did control her. When Minturn was about to despatch her upon a voyage which he had projected, the defendant asserted his rights as owner, and refused to permit the vessel to go to sea. He took actual and potential possession of her, and maintained it until the ship was sold. He became owner in possession in fact, as well as in law, and is subject to all the obligations of an owner.

The possession of the vessel by Nathaniel G. Minturn, if he could be deemed to be in possession, was inconsistent with the bill of sale, and the paper claimed to be a mortgage or defeasance of said bill of sale. The bill of sale was absolute upon its face, and it could not be known to the world, that any other person, except the defendant, had any claim of ownership upon the vessel. Minturn's possession, therefore, is to be deemed to have been the possession of Franklin by his agent, and the plaintiffs' rights cannot be prejudiced by any secret arrangements between those parties.

VII. Under the circumstances of this case, the defendant is liable for the debt, even if he were but a mortgagee, whether he was in possession or not. [15 Johns. R. 298. 15 Mass. R. 477. 2 *Con. Rep.* 215, 222, 224. *Abbot on Ship.* 18.]

It may be said, that the plaintiffs are precluded from any right to pursue the defendant, because they took the note of Minturn for a sum of money due from him, including these repairs. There is no force in that objection, for the note was never paid ; it was

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brought into Court at the trial, ready to be cancelled, and the plaintiffs may waive the note, and proceed upon the original cause of action. This is well settled. [7 Johns. R. 311. *Toby v. Barber*, 5 *Ibid.* 68. *Whitbeck v. Van Ness*, 11 *Ibid.* 409.]

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But the defendant was liable for these repairs, at all events, whether in actual possession or not; and the law will not permit an individual to screen himself from a responsibility of this nature, by an assertion, that his real rights are not, in truth, what they purport to be. The defendant received from Minturn an *absolute*, and not a qualified title to the vessel. If he were mortgagee merely, and if he took the title as collateral security for a pre-existing debt, why did he not state that fact upon his bill of sale? Why did he not, like other mortgagees, state upon the face of his conveyance the real interest received by him, that the rights of Minturn to the property might be known to creditors? This loose mode of conducting business of an important nature, ought to be corrected, and the defendant had no right, legal or moral, to assume an appearance before the world, which had a tendency to deceive the plaintiffs.

The defendant in this case, however, went yet farther than his mere paper title; he pursued all the steps necessary to perfect his title under the laws of the United States. The acts of Congress relative to the registration of vessels, (*Graydon's Dig.* 396,) make no reference to the rights of a *mortgagee*, and his title need not appear at the Custom-house. But when the title to a vessel is changed, the law imperatively requires the person who becomes the purchaser to make solemn oath, that he is the *sole owner* of the vessel; and if a foreigner be a part owner, that fact must also appear. In short, the *truth* of the case must be disclosed at the Custom-house under oath; and this Court is now to decide whether there is any meaning in those oaths.

Again: whenever a vessel is cleared out for a foreign voyage, and whenever she returns, other oaths are required of the *owner*. These were all freely taken by the defendant, who on all those occasions asserted his own absolute title to the vessel. He is therefore precluded from presenting himself before the Court in any other character than that in which he has constantly maintained

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under the laws of his country. *His oaths are conclusive against him*, and he is estopped from denying that ownership which he has so solemnly claimed.

We contend, that the *owner* of a vessel is liable to shipwrights for repairs, whosoever that owner may be ; and the only fact to be ascertained is, whether the *defendant* was the owner. The jury, it is true, have passed upon a part of the facts ; but the plaintiffs are not prejudiced thereby, because they objected to all the testimony which was laid before them.

Questions relating to the obligations of mortgagees of vessels, for repairs, have been frequently before our Courts, but this precise case has never been presented nor decided in this state. In Connecticut and Massachusetts, however, their Courts have passed upon the liability of the mortgagee under like circumstances, and have held him responsible. [*Starr et al v. Knox*, 2 Con. R. 228, 224, 215. *Tucker v. Buffington*, 15 Mass. R. 477.] And we contend that the *principles* established by our own Courts, fully support the claims of the plaintiffs. [*Leonard v. Huntington*, 15th John. R. 298. *Marquand v. Webb*, 16 Johns. R. 92.]

The case of *Champlin v. Builer*, [18 Johns. R. 169.] cannot strengthen the defence, for it has no reference to the rights of innocent third persons. That was an action for master's wages ; this is for repairs entering into the value of the vessel, whereby the defendant gains an immediate and direct advantage. The proceeds of the plaintiffs' labour passed directly into the pocket of Franklin when he sold the vessel, and he is under every moral obligation to hold the plaintiffs harmless. In the case of *Champlin v. Builer*, there was a covered, collusive voyage, well known to the master, and he contracted with the very parties who kept themselves from public view.

Mr. Anthon and *Mr. Ogden*, for the defendant, *contra*, contended,

I. That the mortgagee of a vessel, *out of possession*, is not responsible for repairs. Whatever may be the speculations upon this point in other states or countries, the law *here* is settled.

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[*8 Johns. Rep. 159. 18 Ibid. 169.*] The case of *McIntyre v. Scott*, [*8 Johns. R. 159.*] is in every respect like this, except in one unimportant particular. In that case, the party who received the bill of sale did not take out a register in his own name, until towards the close of the transaction. But that is not a matter of any consequence, because the register has nothing to do with the evidence of title. It has reference merely to the revenue laws, and the national character of the vessel. [*Leonard v. Huntington*, *15 Johns. R. 298.* *Sharp v. The United Ins. Co.*, *14 Johns. R. 201.*]

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II. The true question to be determined is, whether the defendant was absolute owner, or mortgagee ; and upon this point the testimony was conclusive to show that the defendant was a mere mortgagee out of possession, to whom no credit was given by the plaintiffs. The evidence upon this question was submitted fairly to the jury, and they found for the defendant. This makes the distinction between the case under consideration and that of *Tucker v. Buffington*, [*15 Mass. R. 477.*] cited by the opposite side. In that case, the mortgagee was *in possession*; if so, he was entitled to the freight, and would be liable for repairs ; but being out of possession, the mortgagee receives none of the vessel's earnings, and is not bound for her repairs.

Much stress is laid upon the fact, that the defendant took the usual Custom-house oaths ; and it is contended that he is concluded by them. The defendant was bound to make those oaths, else the vessel would have lost her national character; and besides that, the *legal title* was in him. There is no mode by which a mortgagee's interest can be made safe, except by an absolute bill of sale, for his rights as such are not known or regarded at the Custom-house. But this point has also been before a most intelligent and learned Judge, and has been decided upon principle. It may therefore be considered as settled in favour of the defendant. [*1 Mason's Rep. 306, Weston v. Penniman.*]

If the defendant had held himself out as owner, for the purpose of procuring credit for the vessel, or even if the plaintiffs, before they made the repairs, had ascertained by the register at the

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Custom-house, who the owner was, for the purpose of giving him credit, then the question might have been different. But the proof is conclusive, that the only person trusted was Nathaniel G. Minturn, and that the defendant's claim upon the vessel was not known until after the repairs were made. Upon every point, therefore, of law and fact, the case is with the defendant.

III. N. G. Minturn was a competent witness, his testimony having the effect of charging himself. His interest is balanced; he must pay one party or the other, and it is a matter of indifference to him which he pays. How can Minturn be liable for costs? If the defendant was the absolute owner of the vessel, or if he was a mortgagee in possession, he is bound to pay for the repairs without suit, and cannot cast the costs of the defence on Minturn. If the defendant was a mortgagee out of possession, he cannot be compelled to pay, and of course no costs can fall upon him. Minturn never directly or by implication undertook to hold the defendant free from every attack which third persons might choose to make upon his rights. If the title were impeached, it would be another matter.

IV. The defeasance being prior in date to the plaintiffs' claims, it was correctly received in evidence as part of the *res gestæ*. The defeasance existed in parol long before it was reduced to writing, and was even then good. But if the sale in the first instance had been absolute, the defeasance would have converted it into a mortgage. The plaintiffs were not prejudiced by this, the repairs being put upon the vessel by order of Minturn, who exercised all the acts of ownership. The essence of the contract between the defendant and Minturn, in relation to the ship, was that Franklin should be secured for his loan by a mortgage. If the defendant had done any act inconsistent with Minturn's rights as mortgagor, it would have been not only a violation of his contract, but of good faith. It is not essential that the defeasance should be executed at the time of the conveyance, or that it should be under seal. There is no objection, therefore, to the proof upon this point, as offered at the trial.

V. Benjamin G. Minturn's testimony was unobjectionable, he being privy to the transaction from the beginning, and testifying to facts within his own knowledge.

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VI. The Judge submitted the whole case correctly to the jury, and their finding was consistent with the evidence.

JONES, C. J. This was an action by the plaintiffs in this suit against the defendant, for work, and labour, and materials found, &c., in repairing the ship Concordia, when she stood in the name of the defendant as ostensible owner, and the defence was, that the defendant was mortgagee out of possession, and therefore not answerable to the plaintiffs for the repairs done by them to her. The question of absolute or qualified ownership, and the fact of possession, were the chief points of litigation at the trial, and to which the testimony was exclusively pointed. The Judge charged the jury, that if they were satisfied that the defendant was the owner of the ship, or mortgagee in possession, at the time the work was done, the plaintiffs were entitled to recover; but if the jury, from the evidence, believed that the defendant was not owner, but was a mortgagee, and out of possession, then they ought to find for the defendant; and under this charge, the jury gave their verdict for the defendant.

The plaintiffs now move to set that verdict aside, and for a new trial, insisting that the admissible evidence showed the ownership of the Concordia to have been in the defendant, and that the evidence which went to disprove his title as owner, and to show his interest to have been that of a mortgagee, was inadmissible; and also insisting further, that if he was in fact clothed with a mortgage interest solely, he appeared by the evidence to have been in the possession of the vessel, and to have exercised acts of ownership and a control over her, or to have possessed the undisputed right to the possession and control of her, and was, on either ground, chargeable with the repairs; and moreover contending broadly, that even if the defendant was a mortgagee out of possession, he was still responsible as the legal owner; or if the general rule were otherwise, that this case would form an exception, and the

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defendant would be liable upon the special ground, that the re-
pairs in question had enured to his benefit, by enhancing the va-
lue of his security.

The first question then is, whether the defendant was, in judg-
ment of law, the absolute owner of the ship, or mortgagee, or trus-
tee only, at the time the work was done.

The plaintiffs, to establish the ownership of the defendant, pro-
duced and proved the Custom-house register of the ship, with the
affirmation of the defendant, that he was sole owner, by which doc-
ument so produced, it appeared that a new register had been issu-
ed for her, on the 15th of October, 1824, her previous register, issu-
ed on the 27th of August next preceding, being then surrendered,
in consequence of a change of property. The new register was
issued at the request of the defendant, and upon his affirmation
that he was the sole owner of the ship, and she was thereby regis-
tered in the usual form, as the sole property of the defendant.
The affirmation of the defendant, when he applied for and obtain-
ed the register, was also produced, by which it appeared that he,
on the same 15th of October, 1824, affirmed, in the usual form, that
he then was the true and only owner of the ship, and that there
was no subject or citizen of any foreign prince or state, directly
or indirectly, by way of trust, confidence, or otherwise interested
therein, or in the profits or issues thereof. And it was proved that
no change had taken place in the registry, intermediate the date,
and issuing of the same, and the time the work was done.

To refute this documentary proof of ownership, the defendant
produced and read in evidence a bill of sale of the ship from Na-
thaniel G. Minturn to him, the defendant, bearing date the same
15th of October, 1824, and being on the face of it an absolute trans-
fer of the ship to him. He then called Minturn, the apparent
vendor, to prove that the bill of sale, though absolute in its terms,
was given to him, the defendant, and taken by him as collateral
security for a loan of six thousand dollars made by Franklin and
Minturn to Nathaniel G. Minturn, the owner of the ship. The
witness was objected to, as incompetent to testify to that point,
and as being interested. He testified on his *voir dire* that he had
no interest in the event of this suit; and not being deemed by the

Court to be otherwise incompetent, he was admitted to testify in chief.

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He proved that he was the owner of the Concordia on the 15th of October, 1824, and on that day borrowed of Franklin & Minturn, of which co-partnership the defendant was a member, the sum of \$6000, in the endorsements of their house, and gave the bill of sale of the ship to the defendant, as collateral security for the loan ; and that the defendant, afterwards, on the 29th March following, to manifest the trust, gave a written acknowledgement as evidence of the contract. The instrument was produced, and being proved by the witness, was offered in evidence. The counsel for the plaintiffs opposed its reception, on the general ground, that the bill of sale being absolute in its terms, evidence was not admissible to contradict, vary, or explain its import, by showing it to be defeasible ; and upon the special grounds, also, that it was not under seal, and was not executed simultaneously with the bill of sale, but after an interval of upwards of five months. It was, however, allowed to be read to the jury, subject to the objections to its competency. We are now to decide upon its title to admission in evidence.

First, then, could it be received to show that the bill of sale which professed and purported to be evidence of absolute ownership in the defendant, was in reality a security only for a loan from his house to Minturn ? The general rule is, that a deed must be construed by itself, and that extrinsic evidence cannot be received to explain, vary, or contradict its sense or import, as collected from the terms it employs.

But the case of a mortgage or trust interest has long been an established exception to the rule ; and the competency of extrinsic proof, to show that an absolute deed is to operate as a security for a loan, and not as an absolute conveyance, has been so often and so universally admitted, both in courts of law and equity, that it has grown up into an elementary principle of the law of mortgage. It is a principle peculiar to mortgages and trusts. Courts consider it as a necessary safeguard to borrowers, and a rule of evidence which policy and a sense of justice require them to apply, and to which even the solemn and conclusive nature of deeds

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must bend. The deed is treated with all the respect and deference which can consist with a just regard to the protection of the borrower, and the extrinsic evidence is not received to qualify the deed, but to establish the fact of the loan ; and it is the proof of the loan, on the security of the property vested by the deed in the vendee, that renders the deed thus given to secure it, a defeasible conveyance. The decisions of our own Courts are decisive on the point. In *Marks v. Pell*, [1 Johns. Ch. R. 594,] and in *Strong v. Stewart*, [4 Johns. Ch. R. 167,] it was ruled that parol evidence is admissible to show that a mortgage only, and not an absolute deed was intended. And in *Henry v. Davis*, [J. C. R. 90,] it was held, that a conveyance of real estate intended merely as a security for a debt, though absolute on the face of it, is a mortgage. The same principle was established in the Court for the Correction of Errors, in the case of *Dey v. Dunham*, [15 Johns. R. 555.]

The rule obtains equally at law as in equity, and both in England and in this country, it is an axiom that it is always competent to show that a transaction, appearing on the face of it to be a sale, was in fact a loan, and that the proof of the loan gives to the deed which is intended to secure it, the character of a mortgage. It is not essential that the defeasance should be by deed to produce that effect upon the absolute conveyance. The cases already cited conclusively show that the agreement which operates as a defeasance, or which, in other words, establishes the loan that produces that effect, may be without seal, or even by parol. Nor is it necessary that the declaration or defeasance, if in writing, should be executed simultaneously with the deed. In the case of *Dey v. Dunham*, the written defeasance was not given until six months after the deed was executed, and it embraced a subsequent loan and security, but the parol agreement for the loan on the security of the deed, was contemporaneous with the deed ; and that agreement operated to qualify the deed, and characterize it as a conditional and defeasible conveyance.

So in the case at bar : the agreement by parol for the loan upon the security of the ship, which preceded the bill of sale, impressed indelibly upon that instrument the character of a trust, or collateral security for the debt, and the subsequent declaration in

writing merely manifested the prior agreements, and preserved the evidence of it, by reducing it to writing. In strictness, however, the parol agreement for the loan, and the subsequent writing, did not create a mortgage-interest; for the condition must be incorporated in the conveyance, or a written defeasance must be executed simultaneously with it, to constitute a technical mortgage; but that agreement created a trust which attached to the title vested by the bill of sale in the lender of the money, and which bound his conscience to hold the ship as a collateral security for the debt, and not as absolute owner of the property. This trust was in substance a mortgage-interest, though the conveyance was not in form a mortgage, and equity would enforce it, if sufficiently established by proof, notwithstanding that it was by parol; or if any question could be made of the legal obligation of the lenders, on the ground of trust from the application of the statute provisions to the case, the subsequent declaration of the trust in writing, was sufficient to satisfy the terms of the act, and to establish the trust. The statute only requires that the trust shall be manifested by a declaration in writing, not that it shall be created by deed; and it is well settled, that any writing expressing and declaring the trust, whether it be made at the time of the execution of the deed, or after it, will be sufficient evidence of the trust to entitle the *cestui que trust* to the aid of the Court in enforcing its performance, and that it is not necessary that the trust should be declared at the time it is created.

The case of *Steere v. Steere*, [5 Johns. Ch. R. 1,] is in point to show, that a trust need not be created by writing, and that when by parol it is sufficient to take it out of the statute, that it be manifested and proved by writing, under the hand of the party to be charged as the trustee. The solemnity of a seal to the declaration of trust, is not required to impress an absolute deed with the trust which that declaration manifests, and it is sufficient that the written declaration is made before the trust is sought to be enforced. The writing, therefore, which the defendant in this case gave to Minturn in March, was a sufficient manifestation and proof of the trust of the bill of sale executed by him in the preceding October, and it was competent evidence to show that the bill of sale,

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under the previous proof of the fact of the loan on the credit of the vessel, though absolute in terms, was merely a collateral security for the loan made by Franklin & Minturn upon the credit of it. If that evidence was admissible; it must surely be conclusive, for it is clear and positive.

But it was intimated that this evidence was only admissible to qualify the deed as between the parties, and could not affect the right of strangers. I can discover no line of distinction between parties and strangers, in the application of the rule. The question is, whether extrinsic evidence can be received to show that the transaction was a loan on the credit of the ship, as collateral security, and not a purchase of the vessel, and if the terms of the deed do not estop the party who receives it from showing that it was not a sale, but a pledge for a loan, he cannot be precluded from the benefit of that proof in a controversy with a party who seeks to charge him as absolute owner. If indeed, a stranger should be deluded or misled by this ostensible ownership of the vendee, and actually supply the ship on the credit of his responsibility, a question of some delicacy would be presented, which, however, would involve considerations beyond the mere fact of apparent title in the party. But it is not pretended that the plaintiff in this case has any such ground of complaint, for it does not appear that he had any knowledge of the bill of sale, or gave any credit to the defendant. His right of recourse to the defendant, if he has any, results from the legal obligation of the defendant as owner of the vessel, or must rest upon the other grounds of liability imputed to him in his character of trustee or mortgagee. If he was, in judgment of law, the absolute owner, his obligation would be perfect, whether his ownership was known to the plaintiff or not; but if he has disapproved the charge of ownership, he has excused himself from the obligation which that relation would have imposed upon him.

It was strenuously urged that the register of the ship in his name, and his affirmation of the sole ownership of her, estop him from disclaiming his title as owner, and some irregularity of conduct seems also to be imputed to him in assuming that character. I see no just ground for reprehension in the change of the papers.

at the Custom-house, nor any sufficient reason for the estoppel which is supposed to conclude him. The transfer of the register to himself might be necessary to his security, and the affirmation he made of sole ownership, indispensable to that transfer. That affirmation was true, for he was the sole owner in whom the whole legal title was vested by the bill of sale. His title was affected by the trust for Minturn, but that trust was a beneficial interest, and not a legal title; and it was strictly true that no alien was interested directly or indirectly in her, and his affirmation goes no farther than to deny the interest of aliens. I discover nothing in the affirmation, or the register inconsistent with the defence he now makes. He was the true and sole owner of the ship; but he held her in trust for Minturn, and every trustee is equally the owner of the trust estate which is vested in him.

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Neither the terms of the registry act or of the revenue laws, nor the policy of the system, appear to me either expressly or by implication to exclude trusts of vessels for citizens, or to require the disclosure of such trust by the trustee. It was the secret interest of foreigners in American vessels, that Congress meant to prohibit, and against which the provisions of the act are intended to guard,—and in that spirit the oath plainly draws the distinction between the citizen and the foreigner. It prescribes a searching form of denial of all possible interest of aliens; but it confines that denial to aliens, and thereby impliedly allows the subsistence of such interests in citizens. The other provisions of the acts to which we are referred obviously contemplate the case of part owners in whom the legal title to the ship is partly vested, or whose names appear upon the bill of sale or the registry, and not to mere *cestui que trusts* whose title or interest the statutes disregard.

I am satisfied therefore, that the defendant was not incorrect in his acts at the Custom-house, and ought not to be estopped by those acts, or his affirmation of title in himself, from shewing the truth of the transaction. And the disclosures he has made appear conclusively to shew that he was not the absolute owner of the ship, but held her in trust, as security for the loan made by his house on the credit of her.

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The next enquiry is, whether he was in possession of her during the time that the repairs were put upon her by the Plaintiff; and the testimony appears to me equally clear and decisive against the fact of possession, as against the absolute ownership of the defendant. Minturn, who best knew the facts, testifies positively that he had himself the exclusive possession and sole charge and management of the ship, during the whole period in question, and that the defendant never took possession of her or had any charge or agency concerning her, or exercised any control or ownership over her, until the interference to prevent the voyage to Turks Island, about a month before the commencement of this suit. B. G. Minturn and the master confirm and corroborate his statement, and the testimony of the plaintiff conduces to the same result.

In opposition to this strong current of oral testimony, the acts of the defendant in taking the title and changing the register, and the part he took in clearing out the ship for her voyages, with his interdiction of the projected voyage to Turks Island, and his subsequent sale of the vessel, are the only proofs of possession relied on. What do they weigh? The change of papers was important to his security ; and the clearance of the vessel was necessary to her employment—they were mere formal acts entirely consistent with his character as Trustee, and were no evidence of actual possession in him, not inconsistent with the possession of the *cestui que trust*. The interdiction of the voyage to Turks Island and the sale of the ship, were acts of possession as well as ownership, but they were long subsequent to the repairs for which the plaintiff sues, and were acts done with intent to wind up the concerns of the trust, and were the necessary means for enforcing his security and realizing his debt. He did not take possession of the ship for the purpose of employing her, but for the purpose of sale, and he cannot be charged by that possession with the debts antecedently contracted.

Upon the whole I see no reason for setting aside the verdict.—The charge of the Judge was strictly correct in point of law, and the jury have found a verdict which is fully supported by the evidence. The motion for a new trial must therefore be denied.

OAKLEY, J. This was an action for repairs done to the ship Concordia, between the 10th day of September, 1827, and the month of June following. The repairs were ordered by the captain of the vessel, but the evidence clearly shows that they were in fact made on the credit of Minturn. A bill of the repairs was rendered to him, and his notes taken for the amount, which were partly paid. There is no proof, that the plaintiffs, at the time of making the repairs, knew that the defendant had any interest in the vessel; no account was ever rendered to him, nor was any demand ever made on him for payment. After the failure of Minturn, this action was brought with the view to charge the defendant, as *owner* of the ship.

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It appeared in evidence, that for a long time previous to the 15th of October, Minturn was the owner of the ship. On that day he executed to the defendant an absolute bill of sale of the vessel, and the ship's papers were changed at the custom-house. The defendant made the usual oath of ownership, and the vessel was registered in his name, and continued to be registered in his name until after the commencement of this suit. It was clearly proved, however, that the bill of sale was given as a *mortgage*, to secure to the defendant a large sum actually loaned to Minturn on that day; and was so understood and agreed to be, by the parties at the time it was executed. That the defendant, on the 29th of March, 1825, signed a written agreement, and delivered it to Minturn, setting forth that the transfer of the ship to him, was as security for the said loan, and engaging to reconvey the same on payment of the money. It also clearly appeared that the defendant never had possession of the ship, and never received any of her earnings, and never in any manner interfered with the control of the vessel by Minturn, until long after the repairs in question were made. The vessel was always cleared out at the custom-house by Minturn, the defendant making on those occasions the necessary oaths as registered owner.

The plaintiffs contend, in the first place, that parol evidence was inadmissible, to show that the bill of sale was intended as a mortgage. This point seems to be decided in the case of *Champlin v.*

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Butler, [18 J. R. 169.] In that case, as in the present, there was an absolute bill of sale, and parol evidence was admitted to show that it was intended as a mortgage. In the present instance, however, it would seem unnecessary to rely on the parol evidence of the understanding of the parties at the execution of the bill of sale. On the supposition that it was then an absolute sale, it was certainly competent for the parties, by a subsequent written agreement, to convert it into a mortgage. This was done by the instrument of the 29th of March, 1825, and long before the repairs in question were made upon the vessel.

It is in the next place contended by the plaintiffs, that the oath of the defendant, and the registry of the vessel at the custom-house, are conclusive evidence of ownership of the vessel in him. The law has been decided to be otherwise. It has been repeatedly held, that the registry at the Custom-house does not determine the ownership of a vessel, and that its object is merely to show her national character, and to entitle her to the advantages secured by the laws of the United States to vessels of our own country. [*Sharp v. United Ins. Co.* 14 J. R. 201. *Leonard v. Huntington*, 15 Ib. 302;] And in *Weston v. Penniman*, [1 Mason, 318.] it is considered by Judge STORY, that a mortgagee of a vessel may declare himself the legal owner, for the purpose of the registry acts, without in any manner altering the relations existing between him and the mortgagor. The defendant, then, is not concluded by registering the vessel in his own name, because the act is consistent with his character as mortgagee, and is open to explanation, in the same manner as the bill of sale.

The defendant, then, being mortgagee of the ship out of possession, as found by the jury in this case, the law seems to be clear that he is not liable for repairs, unless they are made upon his credit, or by a special contract with him. It was so expressly held by the Supreme Court in *McIntyre v. Scott*, [8 J. R. 159.] the leading circumstances of which case were very similar to those of the present; and the doctrine of that case has been repeatedly recognized since. [*Champlin v. Butler*, 18 J. R. 169. *Leonard v. Huntington*, 15 J. R. 298. *Thorn v. Hicks*, 7 Cowen's

R. 697.] These cases settle the point too clearly to admit of doubt. June Term, 1829.

The plaintiffs have further insisted, that *Minturn* was an incompetent witness, on the ground of interest. The plaintiffs sought to charge the defendant as *owner* of the ship. After they had offered *prima facie* evidence of that fact, the defendant proved the sale of the ship by *Minturn* to him, which on its face was absolute, and then called *Minturn* as a witness. He was objected to as incompetent. As the case then stood, there was, clearly, no ground for the objection, and it was properly overruled. He was then sworn on his *voir dire*, and stated that he had no interest in the controversy, and was then sworn in chief.

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When the witness was sworn in chief, there certainly was no ground for rejecting him as interested. His relation to the vessel had not appeared. Apparently he had parted with all right to her, and as he then stood, was manifestly interested to fix the expense of the repairs on the defendant, by which he might have discharged himself from the plaintiffs' claim on him. On the supposition that his testimony shewed him interested, in any degree *in favour* of the defendant, I do not find that the Judge was requested to exclude it from the case, or to instruct the jury not to regard it. Under such circumstances, as the defendant's whole case was clearly proved by other witnesses, I do not think that a new trial ought to be granted, though *Minturn* should be considered as an incompetent witness.

His incompetency, however, is supposed to consist in this. Showing himself to be the mortgagor of the ship, and in the exclusive possession of her, it is contended, that in case of a recovery by the plaintiffs, he would be liable to indemnify the defendant against the *costs of this suit*, and that such an interest excludes him as a witness, on the authority of the case of *Hubby v. Brown*. [16 J. R. 72.] I cannot perceive how the defendant in this case stands in the relation of surety for *Minturn*, for the repairs made to the vessel. The defendant, if liable at all, is so as owner, or mortgagee in possession. If liable in either character, he was bound to pay in the first instance, on the ground that the contract for the repairs, in judgment of law, was made directly between

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June Term, 1829. him and the plaintiffs. He could then have no pretence to call on *Minturn* to indemnify him against costs. He might charge him with the amount paid for repairs, as an expenditure on the vessel, while in his possession, but could not demand the costs of a suit, which was the consequence of his own default.

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The witness, in my opinion, was equally liable to either party, for the amount of the plaintiffs' demand, whatever may be the issue of this cause, and was therefore a competent witness for either.

*Motion for a new trial denied.*

[E. Anthon, Atty for the deft.]

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THE NIAGARA INSURANCE COMPANY,

*versus*

JOHN SEARLE, GEORGE BARCLAY, GEORGE CHANCE, FRANCIS BARETTO AND ROBERT BAYARD.

The plaintiff loaned to the defendant Searle, \$15,000 upon goods on board the brig Ocean, whereof S. was master, and received from the defendants a respondentia bond as security for that loan. The vessel was bound from New-York to Calcutta, and from thence back to New-York, with liberty to touch at Madeira on the outward passage. By the first condition of the bond the vessel was to proceed with all convenient speed on her voyage, which was to terminate within 18 months; II. She was to have on board during the whole voyage the stipulated amount of property; III. The voyage was to be performed without deviation; and by a further condition the defendants were to pay the \$15,000 on the return of the vessel, or at the expiration of 18 months from the date of the bond, whichever should first happen.

The time stipulated in the bond being expired and the vessel not having returned, the plaintiff brought an action of debt on the bond, to which the defendants (with the exception of Searle, who was not arrested,) pleaded that after the brig sailed on her voyage, and before she arrived at Calcutta, the plaintiff, in consideration of an additional premium of \$300, agreed with the defendants, as

*sureties* for Searle, that the vessel should have liberty to proceed from Madeira to the Canaries, and a port or ports in South America, India or elsewhere, and from thence to a port in the United States. That the vessel proceeded from Madeira *on the voyage last mentioned*, was then prosecuting it with all reasonable dispatch, and had not returned to the United States at the time the action was commenced.

Upon *demurrer* to these pleas it was HELD that the new agreement made with the sureties, did not vary or alter the terms of the original contract any further than to preclude the plaintiffs from taking any advantage of a *deviation* from the voyage prescribed in the condition of the bond. It authorised a change in the *course* of the voyage but did not *extend the time* for its performance, and the plaintiffs had judgment on the demurrer.

As the new contract was not under *seal*, quere, whether the terms of the bond could be varied by the parol agreement? And if so, whether the pleas themselves are good?—

This was an action of debt upon a respondentia bond, bearing date the 25th day of August, 1826. The defendant Searle was returned by the sheriff "not found," but the other defendants appeared and craved oyer of the bond and its condition. The bond was in the ordinary form for the payment of money; but from the recitals in the condition it appeared that the plaintiffs had lent and advanced to John Searle, the sum of \$15,000, upon goods, wares, merchandise and specie, to that amount laden on account of Searle, on board the brig Ocean of New-York, whereof he was master: which goods, wares and specie, and the proceeds and returns thereof, were hypothecated and mortgaged to the plaintiffs, for the faithful performance of the condition of the bond. That the said vessel was bound on a voyage "from New York to Calcutta, and from thence back to New-York, with liberty to touch and trade at Madeira, on the outward passage." That the plaintiffs were "to stand and bear the risks against which the said company usually insure by their cargo-policies, on the said sum, so lent and advanced on the said goods," "during the said voyage," provided the same did not "exceed the term of eighteen calendar months, to be computed from the day of the date" of the bond. The condition of the bond provided, that the vessel should proceed with all convenient speed on her voyage and return to New-York, with the amount in value above stipulated on board: "to end her voyage at New-York, by or be-

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"fore the end or expiration of eighteen months, from the date" of the bond ; "and that without deviation, the dangers and casualties of the seas excepted." And if the defendants, or either of them, should pay to the plaintiffs, the above sum of \$15,000, immediately upon the arrival of said vessel at New-York, or at the expiration of eighteen months from the date of the bond, whichever event should first happen, together with the sum of \$2550, the stipulated marine interest and premium on said loan : or if the said defendants, or either of them, should immediately after the return and arrival of said vessel at New-York, provided such return should happen within eighteen months from the date of the bond, give security, satisfactory to the plaintiffs, to pay the said sums within three months from the time of such return, with lawful interest thereon from the time of such return, and should pay the same at the expiration of said three months : or if in the said voyage and before the end of eighteen months, a total loss of the goods and specie, by the risks against which the company usually insure by their cargo policies, should unavoidably happen, and the defendants should abandon to the plaintiffs said goods and specie, and their proceeds, &c. ; then the obligation was to be void.

The defendants who appeared were, in fact, mere sureties for Searle, and they interposed two special pleas in bar of the action. In the first they set forth, that the vessel sailed upon her contemplated voyage on the 6th day of August, 1826, having on board the goods and specie specified in the condition of the bond. That afterwards, on the twentieth day of February, 1827, before the arrival of the vessel at Calcutta, in consideration of an additional premium of two per cent on said sum of \$15,000, paid by the defendants to the plaintiffs, the plaintiffs agreed with the said Francis Barretto, Jr., George Barclay, George Chance, and Robert Bayard, "as sureties of the said John Searle," that the vessel "should have liberty to proceed from Madeira to the Canaries, and a port or ports in South America, India, or elsewhere, and at and from thence to a port in the United States." That the said vessel having arrived at Madeira, pursuant to the liberty given, did, afterwards, to wit, on the 20th day of February, 1827, "proceed from Madeira, in and upon the said last mentioned voyage, to the Canaries, and a port or

ports in South America, India, or elsewhere, and at and from thence to the United States; and although the said brig from thence hitherto hath been, and yet is, prosecuting the said intended voyage last mentioned, with all reasonable diligence and despatch, according to the true intent of the liberty given as aforesaid, yet the said brig hath not as yet returned to, or arrived at a port in the United States."

The second plea alleged, that the said sum of \$15,000 was loaned and advanced by the plaintiffs to Searle, at his request and for his sole benefit, upon the terms and for the purposes mentioned in the condition of the bond, and that the same was executed by the other defendants as mere sureties for Searle, without interest or benefit to themselves, and for his accommodation, whereof the plaintiffs had notice at the time of making the loan. That the vessel immediately thereafter proceeded on the voyage specified in the condition of the bond, with the goods and specie on board, having liberty to touch at Madeira on her outward passage. That afterwards and before the arrival of the vessel at Calcutta, the said Searle advised the defendants, Barclay, Chance, Bayard, and Barretto, of his "*intention to deviate from the voyage,*" in the condition of the bond mentioned, "by touching at the Canaries, and some other port or ports after leaving Madeira :" whereof the plaintiffs had notice on the 20th day of February, 1827. That the plaintiffs, in consideration of an additional premium of two per cent on said sum of \$15,000, paid to them by the sureties, agreed with them that said brig should *have liberty* to proceed from Madeira to the Canaries, and the other ports mentioned in the first plea. That the said brig, after touching at Madeira, on the day and year last aforesaid, to wit, at the city and in the county aforesaid, set sail and departed on the said last mentioned voyage, from thence to the Canaries, to a port or ports in South America, &c. : and that although the said vessel from thence, had hitherto constantly pursued and prosecuted said last mentioned voyage, with all reasonable diligence, yet she had not yet arrived at a port in the United States.

To these pleas there were separate general demurrers, and joiners therein. The counsel for the plaintiffs contended,

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I. That by the terms of the respondentia bond mentioned in the pleadings, the plaintiffs had a right, in the absence of loss by any of the perils insured against, to sue for the amount of the bond at the expiration of eighteen months from its date, without waiting for the termination of the voyage.

II. That the alleged agreement of the 20th of February, stated in the pleas of the defendants, had at most no other operation or effect, than to authorise a deviation from the *iter* of the voyage described in the respondentia bond, and did not enlarge the time limited for its performance, and the payment of the money specified in the bond.

III. That the pleas were defective, there being no averment that the vessel had not deviated previously to the 20th of February, nor that she had on board the stipulated amount of goods at any time subsequent to her sailing from New-York.

IV. The pleas state the supposed enlargement of the time by implication, and not by positive averments, and seek by an alleged agreement not averred to be under seal, or even in writing, to vary and alter the terms of a sealed instrument.

*Mr. F. Griffin*, for the plaintiffs.

As the contract originally stood, there can be no doubt as to the plaintiffs' right of action. The money was repayable absolutely at the expiration of eighteen months from the date of the bond, unless the vessel was lost by some of the perils insured against. The stipulated time having expired, and no loss having occurred, the question is, how are the rights of the plaintiffs affected by the contract made in February, 1827?

Originally, the designation of the voyage was distinct : the vessel was to proceed from New-York to Calcutta, with liberty to touch and trade at Madeira on her outward passage. Under this agreement, if there had been any deviation from the voyage, the

bond would instantly have become absolute, and it could not have been avoided by a subsequent loss. June Term,  
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The time, also, in the first contract, was distinct, and independent of the designation of the voyage. It was contemplated that the voyage *might* last longer than the eighteen months, else it would not have been limited. The ending of the voyage, if it exceeded eighteen months, had nothing to do with the payment of the money, for that became due absolutely at the expiration of that period.

The second contract altered *one* of these independent properties or conditions, without touching the other; and the proposition cannot be maintained, that a change in *the route* of the voyage operates as a matter of course to enlarge the *time*.

The fair mode of construing the amendment, is by ingrafting it on the original contract; and in this form, how would the *whole* agreement stand? The marine interest would be increased from two thousand five hundred to twenty-eight hundred dollars. The vessel, instead of being confined to the direct route to Calcutta, would have leave to go to the Canaries, to South America, or elsewhere; but is the limitation as to *time* affected? The course of the vessel is left free, and she may traverse what ocean she pleases, provided she do not exceed the limited period; but if the time be overleapt, the bond becomes absolute.

In this particular, then, the contract stands, *after* the alteration, as it did *before*; it remains an insurance for eighteen months on the brig Ocean, and when that time expired, the money became due, and the insurance ceased, wherever the vessel might be.

II. What was the *object* of the defendants in making the second contract? Undoubtedly it was to obtain permission for Captain Searle to deviate from his intended route, without endangering their rights under the original agreement. By the terms of *that* contract, he was forbidden to deviate; for every deviation increases the risk. He desired, however, to change the *iter* of his voyage, and according to the averments in the second special plea, communicated his wishes and intentions to the present defendants. The plaintiffs, then, for a new consideration, and an

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additional premium, consented that the iter of the voyage should be changed, but not that the time for its performance should be enlarged. This is a reasonable construction to be put upon the whole contract, and must coincide with the views of all the parties at the time the second agreement was made.

The additional fact set forth in the second special plea, that these defendants were *sureties*, can make no difference in the construction. True it is, sureties are considered in some measure as entitled to the favour of courts, and will not be held responsible beyond the strict scope of their engagements. [*Ludlow v. Simond*, 2 *Caines' Cases in Error*, 1.] But in ascertaining what their engagements are, the rules of construction as to them, differ in no respect from those which apply to their principals.

III. The pleas themselves are defective. Both pleas aver, that the brig set sail from New-York on the 26th of August, 1826, on the voyage mentioned in the original bond. Both pleas take her up again at Madeira, and aver, that since that time, she has been engaged in pursuing the substituted voyage from that place; but neither of them contains any positive averment that the vessel had not deviated on her passage from New-York to Madeira.

With regard to the averment that the vessel, in the course of her voyage, continued to have on board the stipulated amount of goods, the pleas are still more defective. All that is said upon this subject is, that the vessel set sail from New-York with the goods on board; but whether she afterwards *continued to have them on board*, does not appear.

If, therefore, these averments, or either of them, are material, the pleas are defective. Are they material? The instrument is a bond, absolute in the penal sum of thirty thousand dollars. The penalty is to become void on certain conditions. One of these is, that the vessel shall pursue a certain prescribed voyage, without deviation. If she had deviated, that instant the penalty would have become absolute, whether the eighteen months had expired or not. [*Western v. Wilding*, *Skinner's Rep.* 59, 152. *Emerigon on Bot.* chap. 8, sec. 4.]

Another condition is, that the vessel should continue to have on board a certain stipulated amount of goods. If this condition was at any time violated, the penalty would on the same principle become absolute.

The plaintiffs have declared on the penal part of the bond, and by the declaration it appears that the defendants are liable in the sum of thirty thousand dollars. The plea in order to avoid this, should aver a compliance with the conditions of the bond. [Com. Dig. tit. Plead. E. 25. 2. v. 13.—2. w. 33.—*Langwell vs. Palmer*, 1 Sid. Rep. 87.]

Two of these conditions are, that the vessel should not deviate, and that she should always have the stipulated amount of goods on board. A compliance with these two conditions, should be positively averred.—[*Williams vs. Stedman*, Skin. Rep. 345. Holt's Rep. 126.—1. Sid. Rep. 87.] But as the defendants have not in either of their pleas alleged such compliance, the pleas are bad.

IV. The supposed enlargement of time is pleaded by implication and not by positive averment. The time originally limited was eighteen months, and this period had expired before the commencement of the suit. The defendants to avoid this, wished to shew by their pleas, that the time had been enlarged. But this they have not done by any express averment. All that is said on the subject is, that the *voyage was enlarged*, and that the vessel is now engaged in pursuing the substituted *voyage*. From this, the *inference* is drawn, that the time has been enlarged and has not expired. This manner of pleading is decidedly bad, as will appear from the cases before cited.

V. The new agreement is not averred to be under seal, nor even alleged to be in writing. The original contract was under seal, and it is settled beyond all doubt, by repeated decisions, that a sealed instrument can be altered only by an instrument of the same nature. [*Thompson vs. Brown*, 1. Moore, 358.—7. Taunt. 656. 1. East. 619. 8. Taunt. 31. *Tellers vs. Bickford*.—3. T. R. 590. *Littler vs. Holland*, 3. T. R. 590 and 592. (n)—*Farley vs. Thompson*, 15 Mass. R. 25.]

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The court will not *infer* that the contract was in writing, for when the plea is ambiguous the construction is to be against it. [1. *Chit. Plead.* 521. 2.] And where an agreement is not alleged in a *plea* to be in writing, the court will intend that it was verbal. [*Cose vs. Barber, Sir T. Ray, Rep.* 450.] In a *declaration* the averment is not necessary, but in a *plea* it is. [1. *Chit. Plead.* 303.]

But whether this agreement was *in writing* or not, is not very material, for it certainly was not *under seal*. The maxim of legal construction is inflexible : *codem modo quo quid constitutur codem modo dissolvitur*.

*Mr. Hugh Maxwell* and *Mr. Slosson* for the defendants, presented the following points :—

I. The undertaking of the sureties was collateral to that of their principal, and their liability arose only on the default of the principal. In consequence of this relation, the sureties are only liable on the strict letter of their contract, and any act of the obligees, discharging them from this collateral undertaking, is a valid defence.

II. The agreement in question, was such an act, and discharged the sureties entirely from the collateral undertaking in regard to the original voyage, and all penalties consequent on its abandonment.

III. The new voyage was a different voyage, and an entire substitution in the place of the original one, and is not qualified by the limitation in the original voyage to eighteen months, or by the stipulation as to the cargo on board.

IV. The new contract cannot be incorporated with the original condition ; Searle, the principal, being no party to it, and it also being a distinct agreement.

V. The defence is good at law ; and as the agreement is a license merely, it can only be available by way of defence to the action on the bond.

VI. In any event, there was an enlargement of the time for performing the voyage until a reasonable period had elapsed for the performance of the substituted voyage.

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The technical objections to the defendants' pleas, arising from the alleged want of proper averments of the facts, relied upon as a defence, may be easily disposed of. It is perfectly immaterial in relation to the questions now before the court, whether the stipulated amount of goods was on board the vessel or not; for there is no controversy between the parties in relation to that subject. If the defendants have stipulated to do or perform any specific thing, the law will presume that they have complied with all the requirements of their contract until the contrary is shewn. Whether they have or have not performed all the stipulations contained in the condition of this bond is not a subject of present inquiry; and the attention of the court cannot be drawn from the main questions to those which are merely collateral. The averments are all of them sufficiently specific and precise, and it is expressly alleged in the pleas, that the vessel sailed from New-York on the 26th day of August, 1825, "*having on board the goods, wares, merchandise and specie in the condition of the bond mentioned.*" If they were on board when the vessel *sailed*, it is to be presumed that they *continued* there, until the contrary is made to appear. They must have remained on board until the arrival of the vessel at Madeira, unless thrown into the sea, for it is not pretended that there was any deviation before the vessel arrived at that island.

It was not necessary to allege that the vessel had *not* deviated previously to the 20th of February, because such is the presumption, until the contrary is shewn. If she had deviated before that time, the plaintiffs contend that such deviation would have caused a forfeiture of the bond; and if this be so, it is for them to shew a deviation, for the court will not *infer* that the defendants have violated their contract.

But if these objections were tenable and well taken, they are the subjects of special demurrer only, and cannot avail on a gene-

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ral demurrer. They may therefore be dismissed without further remark.

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I. The first subject of inquiry before the court, is whether the defendants can set up the new agreement by way of defence to this action ; whether they can allege and prove, by parol, that a new voyage was substituted in the place of the original voyage ; for if they can, then the plaintiffs cannot under any aspect of their case, maintain this action until the substituted voyage has been performed.

This inquiry leads to a distinct branch of the law ; to the obligations of principal and surety ; for it will be observed that the *original* contract still remains in full force, as to Searle the principal in the bond. The contract on which the defendants rely, is that disclosed more particularly, by their second special plea ; a separate contract between the obligees and the *sureties*, to which the principal is not a party. This defence is not set up by the *principal* but by the *sureties*, and *they* plead that the present action ought not to be maintained against *them*.

The obligation of a surety is collateral merely, and he is never liable except upon the default of his principal. Before you can resort to an action against the surety, you must shew that there has been a violation of the contract on the part of the principal. The obligations of the two are not the same ; the surety undertakes to do, to pay or perform upon the default of the principal, and his contract is conditional. It must be shewn that the condition has been violated before the surety is liable, and that is a prerequisite in the plaintiff's proof, before he will be entitled to recover. [*Ludlow v. Simond*, 2 Caine's, 30. *Rees v. Barrington*, 2 Ves. Jun. 540. *King v. Baldwin*, 17 John. R. (384). *Wright v. Simpson*, 6 Ves. Jun. 734. *Rathbon v. Warren*, 10 John. R. 595.] There are many cases also where the obligations of the surety would be discharged while those of the principal would remain. As in the case of a *tender* by the principal ; here the surety would be *discharged* altogether,—but the tender would merely relieve the principal from interest and damages. [3 Wil. 539.]

II. This defence may be interposed by a surety, in an action at law, and this court has the same power to take notice of his situation which a court of equity has. At law all obligors are considered as principals, and the question whether a surety has been discharged or not, is a question of law. The court will never drive a party to any circuity of defence, where the demand of the plaintiffs can be met and answered at once. In this case the new contract goes to the very foundation of the action, and if available to the defendants for any purpose, it may be interposed as a defence here. [2 *Ves. Jun.* 540. 7 *John. Rep.* 337. 13 *John. R.* 174.]

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III. The bond itself, in the recitals of the condition, discloses the fact, that the present defendants are sureties merely, and that Searle is the principal debtor. This is specially averred by the pleas, and admitted by the demurrs; there is, therefore, no doubt as to the facts upon that subject; and the inquiry next arises, whether the sureties are exonerated from their collateral undertaking by this defence?

It appears from the second special plea, that Searle, the principal, "advised" the defendants, his sureties, that it was "*his intention to deviate*" from the voyage described in the condition of the bond, "by touching at the Canaries, and some other port or ports after leaving Madeira." The sureties, considering themselves as placed in a situation of some peril by this determination of the master, gave immediate notice to the plaintiffs of this fact, and entered into a *new* contract with them, whereby the plaintiffs, for an *additional premium*, and for the distinct consideration of three hundred dollars, paid to them by *the sureties*, agreed with *them*, that the vessel should not be confined to the track of her original voyage, but might go from Madeira to the Canaries, from thence to South America, to India, and elsewhere, according to the discretion of captain Searle. This new agreement changed the entire condition of the bond, and was a *dispensation* of the sureties from their obligations on the whole contract. A *new voyage* was determined upon, and the original one was totally abandoned; every thing connected with it was gone, and the defendants were exonerated from their first agreement. The original condition of

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the bond was entirely changed, and the instrument on which this action is brought, is to be looked upon as if dated on the 20th of February, 1826. The vessel, at that time, is supposed to be at Madeira, and when she departs from thence, she departs upon a new voyage, under the new agreement.

Where the *termini* of a voyage are changed, the alteration, of itself, constitutes a new voyage. [11 John. R. 261. 14 John R.

46. By the original agreement, the voyage was to terminate at New-York; by the new contract, it may end at any port in the United States. Suppose the vessel had deviated from the route specified by the new contract, could such a deviation be assigned as a breach of the condition of this bond? To go on a new voyage, must certainly be an abandonment of the old one, and to charge these defendants for a violation of their contract, the plaintiffs must shew a breach of the conditions of their last engagement.

The relative condition of all the parties is changed, for these defendants have lost their remedy against Searle, by entering into a new contract. This agreement is not binding upon him in any way, and the sureties can do nothing either for the benefit or to the prejudice of the principal, without his consent. No action can be maintained against Searle on the new agreement, and the sureties are not liable upon the original one. A *joint* action will not lie against the principal and sureties upon *either* contract, but the principal continues responsible upon his original engagement, and the sureties upon the new one. The plaintiffs saw fit, for a fresh consideration, to discharge these defendants from their first undertaking, and accept of a new engagement in its place; this last agreement we are ready to fulfil in all its parts.

IV. The original voyage was limited to the period of eighteen months; but the new voyage is not restricted by any such limitation. It could not be thus limited, because, under the new agreement, a different track is to be pursued, different countries are to be visited, and a different period of time would necessarily be embraced by the new voyage. As, by the last agreement the new

voyage is without limitation as to time, it is to be performed within a *reasonable* time.

The limitation of time was a qualification of the particular voyage, stated in the bond as it originally stood, and if a new voyage be substituted, then the limitation ceases. The plaintiff must show that the time has been unreasonably protracted under the new agreement, in order to maintain this action. But our averment that the vessel has "constantly prosecuted and pursued" the new voyage "with all reasonable diligence," and that she has not "as yet arrived at a port in the United States," is, by the pleadings, admitted to be true. No breach of the obligations of the new contract is shown, and the plaintiffs have not, therefore, any cause of action against these defendants.

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V. A parol agreement subsequent, may be set up by a principal in a sealed instrument, *by way of defence*, to an action upon the original contract, to save a forfeiture. This has often been decided by our own courts. Justice cannot be done to a defendant, when sued for a violation of the conditions of his bond, if he be not permitted to show that the plaintiff himself has dispensed with the performance of the condition. The new agreement does not constitute a substantive cause of action against the plaintiff, and is available to the defendant only by way of defence. If a court of law were to deprive the defendant of this privilege, he would in all such cases be compelled to resort to the equitable interposition of a Court of Chancery. But courts of law do not put this hardship upon him, and it has been expressly decided, that it is a good answer to the plaintiff's claim, that he himself, by a subsequent parol agreement, has waived the performance of the very condition which lays the foundation of his action.

In this particular, there is a marked distinction between the situation of a plaintiff and a defendant. The former cannot *ingraft* a parol agreement upon a sealed contract; and if the latter has been altered or changed by a subsequent parol agreement, and the plaintiff seeks to recover by shewing a performance of the new agreement, he must resort to an action of *assumpsit*; for

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his remedy upon the covenant is gone. [*Jewel v. Schrooppel*, 4 *Cow. R.* 565.] But when a defendant is sued in an action of covenant for the non-performance of its conditions, he may shew, in his defence, that the plaintiff, by a subsequent *parol* agreement, dispensed with the performance of those conditions.

This position in no way interferes with the principles of the cases cited by the other side. It is admitted, that where a party, in an action of covenant, relies upon any alteration of a sealed instrument as the ground of a recovery, he must shew that the new contract presents the same solemn evidence which the original presented. Not so with a defendant, who has been absolved from the performance of the very condition, for the non-performance of which an action is brought against him. He may shew the truth of the case, in any form of evidence, and it will always serve as an effectual shield. [*Fleming v. Gilbert*, 3 *John R.* 528. *Keating v. Price*, 1 *John. Cas.* 22. 15 *Mass. R.* 25. 1 *M. and S.* 21. 1 *Esp. Cas.* 34. 1 *East.* 628. 4 *Sear and Raw.* 241. 2 *Wend. R.*, *Langworthy et al v. Smith et al.* p. 587.]

*Mr. Geo. Griffin*, in reply.

It is of some importance, in the investigation of this cause, to have correct general views of the contract upon which the action is founded. It differs from an ordinary loan in two particulars; first, the principal is put in jeopardy; and secondly, the obligees are insurers. The contract assimilates itself nearly to a contract of insurance on time, but differs from it in this, that the parties contemplated a termination of the risk *within the stipulated period*. The liability of the *underwriters*, (that is of the plaintiffs in their capacity of lenders,) expired at the end of eighteen months, at all events, but they had the benefit of the chance, that the voyage might expire before the expiration of that time.

The two principal features in this contract, are the *iter* and the *time*. The time is of vital importance; for if the voyage were to exceed eighteen months, then the plaintiffs would lose all interest on the premium, and the sum paid for the marine risk, although they would be entitled to interest on the principal loaned. The limitation as to the time was therefore introduced into the

contract with deliberation and care, and it was of great consequence to the plaintiffs both in relation to the risk and to the interest.

The *iter* was also of the first importance. The plaintiffs were interested in the *iter* of the voyage to a much greater degree than ordinary underwriters; for they are no further interested in the *iter*, than as it *enhances* the *risk*. But here the *time* would be increased or diminished by the route pursued, and of course that became an object of interest. We are to presume that the plaintiffs, therefore, in forming this contract, had these two prominent objects constantly in view.

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II. The condition of the bond became forfeited on the happening of three contingencies, and the plaintiffs would have been entitled to sue immediately upon the happening of either. 1. On the expiration of the time. 2. On a deviation. 3. Whenever the vessel ceased to have on board the stipulated amount of goods.

Keeping these general propositions in view, what was the contract of February 20th, 1827? It has been treated as if it went to the foundation of the whole arrangement between the parties; and an importance has been given to it, which is in no way merited. It was not a *contract* to deviate, but a *permission* to deviate. It was a mere *license*, no matter whether as to a new or an old voyage. Its effect was to give to the defendants the privilege of changing the *iter* of the voyage: but does *such* a permission thereby necessarily *enlarge the time* within which the voyage was to be performed? The contract itself, in its terms, contains no such thing, and there is some difficulty in discovering from whence the idea is obtained. What would be the consequence of putting such a construction upon the license? The plaintiffs would assume a risk entirely disproportionate to the premium received, and greatly beyond that assumed by ordinary underwriters. For an additional consideration of three hundred dollars, they would become insurers, without limitation of time, of a vessel and cargo, which had permission to traverse the seas of three quarters of the globe. It is no answer, to say, that the

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voyage was to be performed within a *reasonable* time ; for the defendants have entered into no express stipulation upon this point, and the mode of ascertaining the termination of the risk, is altogether too vague and uncertain to be adopted by the Court in giving a proper construction to the contract. The limit of an ordinary voyage is to be estimated from the customary track, but here there is no such rule of estimation, but every thing would be left to opinion and conjecture. The Court will not, therefore, adopt any such uncertain rule, to determine the meaning of an express contract.

But it seems to be supposed by the counsel for the defendants, that because the agreement disclosed by their second special plea, was made with the *sureties* to the bond, that therefore, it is to be governed by different rules of construction. This is obviously a mistake ; for the law construes all contracts by the same general rules. The *obligations* of principal and surety may indeed differ, but their contracts are to be expounded by the same rules.

But there is a point remaining of a graver character, and which the defendants cannot evade. Admitting the full force of their claim, for the purposes of argument, the agreement on which they rely is wholly insufficient for their defence. The instrument upon which we rely is a deed—a solemn agreement under seal. The defendants attempt to destroy the force of this contract, by another and a subsequent agreement by parol, made apparently without the same care and deliberation which attended the first. This cannot be done. It is a fixed and settled rule of law, that a contract by deed must be rescinded by deed to destroy its validity. It cannot be broken up and scattered by the mere force of a loose, vague, and careless agreement by parol. It would not be safe to allow an instrument made with so much care and pains, to be destroyed in this light and unsatisfactory manner ; and the law declares, that the second agreement, in order to supersede the first, must have the same evidence of solemn consideration. In chancery the defendants might have the relief they now seek to obtain ; and we would freely grant it to them, if founded in justice and equity. But when in a court of law, they seek to stretch the new contract, far beyond the intentions of the parties, we

stand upon our defence, and resist what becomes an unjust aggression. True it is, our courts have allowed a *waiver* of such a contract to be proved by parol, and if we had brought our action for a *deviation*, the new agreement might perhaps have availed the defendants, in their present defence. But here the attempt is to change entirely the sealed agreement, and put in its place a mere parol contract. The pretence is, that as to *these* defendants, the covenant is gone—superceded and destroyed. A mere parol contract cannot supercede an agreement by deed, and this defence cannot therefore, under any aspect of the case be, by any possibility sustained.

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OAKLEY, J. after stating the pleadings in the cause.—It was contended, on the argument, by the defendants, that the plaintiffs having substituted a new voyage, for the one stipulated in the bond, the whole contract became thereby abrogated, at least as far as the sureties were concerned ; or if not, that the terms of the condition of the bond were so far varied, that no action could be sustained by the plaintiffs, until the new voyage had terminated.

I do not think it necessary to consider how far it was competent for the defendants to set up a parol agreement to vary the terms of the bond,—though that question was much discussed at the bar,—as I am clearly of opinion, that the agreement alleged in the pleas did not affect or alter the contract of the parties, any farther than to preclude the plaintiffs from taking advantage of the deviation from the prescribed voyage. It amounted to nothing more than a permission that the vessel *might deviate*, and was, in no sense, an agreement that she should undertake a new voyage. It authorised a change in the *course* of the voyage, but cannot, without doing manifest violence to the intention of the parties, be construed to *extend the time* for its performance.—The plaintiffs certainly, when they were granting, for a small additional premium, the liberty to deviate, which was asked by the defendants for their own security against the act of their principal, could never have supposed that they were substituting for a voyage of limited duration, one of indefinite extent as to time. Such a supposition is altogether extravagant. The true construction of the agreement set up in the pleas, is too plain to

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admit of a doubt. That part of the condition of the bond then, which bound the defendants to pay the money at the expiration of eighteen months, in case a loss of the goods did not happen, remained unaffected by the new agreement ; and that time having expired, and no loss of the goods being averred in the pleas, they are clearly no answer to the plaintiffs declaration, and must be overruled.

Judgment for the plaintiffs on the demurrers.

[George W. Strong, *Att'y. for the pliffs.* W. Slosson, *Att'y. for defts. Barclay,
Chance and Bayard.*]

ANDRE ANTHOINE AND J. M. MARAIS,

versus

JOHN COIT.

If improper evidence, objected to at the trial of a cause, be permitted by the Judge to go to the jury, the verdict will be set aside and a new trial granted, notwithstanding there was sufficient competent testimony to warrant the finding of the jury and to sustain their verdict.

In proving an account of sales made by the plaintiffs for the defendant, certain letters from the former to the latter, were read to the jury, with the permission of the presiding Judge not as *evidence* of the facts therein contained, but as *notice* of facts which might be binding upon the defendant if his assent to them could be proved. HELD, that these letters came within the rule which excludes a party from testifying in his own favour, and were improperly admitted. Held also, that although, the verdict in all probability would have been the same *without* the letters as *with* them ; still a new trial must be granted, because the effect of the improper evidence upon the jury, could not be known by the Court.

This was was an action of assumpſit tried before Mr. Justice HOFFMAN, to recover the balance of the proceeds of a certain consignment of Brandy made by the plaintiffs to the defendant. For the facts of the case, the reader is referred to the opinion of the

Chief Justice (where they are fully stated) and to the preceding marginal note. June Term,
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Upon the trial of the cause, the jury having found a verdict in favor of the plaintiffs, a motion to set the verdict aside, and for a new trial, was made upon the ground of the admission of improper evidence by the Judge, and the same was now argued by Mr. *Warner* for the defendant and Mr. *Anton* for the plaintiffs.

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For the defendant it was contended, that there was no evidence to warrant the jury in finding that the cotton sent by the plaintiffs to Lisle was sold at all, except an assertion of that fact contained in their own letters. These letters were mere declarations made by the parties in their own favor, and were not competent evidence to prove a fact indispensable to the plaintiffs' right of recovery. If the truth of that fact had been expressly admitted by the defendant, after the receipt of the letters, then the evidence of such admission might have been received: it could not be inferred from his mere silence. The assertions in the letter, are not to be viewed in the light of an account rendered without objection, for the defendant could not with propriety contradict an assertion which might possibly be true; and no inference is to be drawn against him on that account. Improper items in an account, may of course be pointed out and objected to, but the defendant was not bound to contradict the fact of the sale at the peril of being held to have admitted it by his silence. This testimony therefore was improperly admitted, and a new trial must be granted; for a party's own letters cannot be given in evidence by him to prove a substantive fact, although they be, perhaps, for the mere purposes of notice.

[*1. John's R.* 160.]

In this case the plaintiffs did not prove the sale of the cotton at Lisle in any way except by their own declarations, and these can never be permitted to form the principal ground of a recovery by them.

II. But if the fact of the sale were, in the opinion of the *Court*, proved by testimony other than that furnished by the plaintiffs' letters, still there must be a new trial to correct the error of the

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Judge in admitting improper evidence. It is not the province of the Court to weigh the evidence in questions of fact.—The jury are to do this, and it is the business of the Court to see that no improper evidence is spread before them.

If improper testimony is laid before the jury, *objected to* at the trial, and yet admitted by the Judge, a new trial must be granted, in order to exclude the evidence which ought not to have been admitted. The impression made upon the jury by such evidence cannot be known by the Court, and of course they can have no discretion in judging of its weight. If it is *incompetent* testimony, it must be *excluded* wholly, and if admitted against the objections made to it, a new trial will be granted. This has been the uniform practice in our courts, at least since the case of *Marquand v. Webb*, [16 J. R. 89,] and there have been no exceptions to it.

Mr. Anthon, contra, remarked that the objection to the testimony offered at the trial, was confined entirely to the proof of the sale of the cotton at Lisle. One of the letters from the plaintiffs to the defendant, referred to an account of sales enclosed, and the Judge suffered it to go to the jury merely as *notice*. The defendant was fully apprised of the sale, and he never questioned it. When called upon by Mr. Kneeland, he made no objection to the plaintiffs' demand, upon the ground that the sales were not closed, but he said they had violated his orders, by holding the cotton *too long*. This was an admission that the cotton had been sold, and the letters read were but the assertions of the plaintiffs, *assented to* by the defendant. If the plaintiffs had communicated with the defendant orally, and had stated the fact of the sale in his presence, and he had made the reply which he did in fact make to Kneeland, might not the declarations of the plaintiffs have been proved for the purpose of explaining the defendant's reply? Conversations between parties are always admitted under such circumstances, and the letters in question were admissible for the same purpose. After the lapse of time which has intervened in this case since the forwarding of the accounts, the Court will infer an assent and acquiescence on the part of the defendant. [*Willis v. Jernegan*, 2 Aikn. 251. 1 Cowen's R. 645.

Leverick v. Meigs & Reed. 3 Cowen's R. 7 Ib. 456, La Farge v. Kneeland. 6 Ib. 133, Bell v. Palmer.]

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II. There is testimony enough in the cause to warrant the finding of the jury, without the letters, and if this be the case, the Court ought not to grant a new trial. That the cotton sent to Lisle was sold, and that the plaintiffs have proved it, and can prove it again, there can be no doubt. The testimony of Kneeland alone is sufficient to establish that fact, and the jury again, upon the same evidence, leaving out the letters, would find the same verdict. Where the facts are fully proved by competent testimony, there can be no good reason for granting a new trial, because a little unimportant evidence, not strictly legal, happened to creep in at the trial. Suppose, in addition to the letters read at the trial, the plaintiffs had produced another letter from the defendant to themselves, admitting the sale of the cotton in express terms, would the Court grant a new trial for the purpose of shutting out the letters of the plaintiffs? The rule contended for goes to this extent, and it has no foundation in justice or good sense. The case of *Marquand v. Webb*, does not necessarily go the length of this case, and the rule there laid down ought not to be extended. The decision of the Judge at the trial was correct in principle, and its application to the case under consideration was entirely proper. But even if not strictly correct, a new trial, which never can vary the result of the cause, ought not to be granted.

JONES, C. J. This was a motion for a new trial, on the ground of the admission of illegal testimony, and the misdirection of the Judge to the jury.

The plaintiffs' demand was for the surplus and balance of the nett proceeds of a consignment of brandy, shipped by them to the defendant, over and above the net proceeds of a consignment of cotton received by them from him, for sale for his account and risk, and sold by them.

The defence was, that the brandy was a remittance in anticipation of the proceeds of the sale of the cotton, to be reimbursed

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out of those proceeds, when the cotton should be sold ; and that the cotton, when received by the plaintiffs, was worth more money in the market to which it was sent, and if sold in conformity with the instructions of the defendant, would have produced a larger amount of net proceeds than the price and value of the brandy ; but that the plaintiffs had, in disregard of the orders of the defendant, and contrary to their duty as factors, so neglected and delayed the sales of the cotton, and retained and kept the same so long on hand unsold, that the same was greatly reduced in value, and was lost to him, by which misconduct, they had made the cotton their own, and become chargeable and accountable to him for the market value of the same at the time of the consignment, which was more than sufficient to satisfy the balance claimed of him on the sales of the brandy.

It appeared by the testimony of the plaintiffs' witnesses, that the plaintiffs, in December, 1818, received from the defendant a consignment of seventeen bales of cotton, for sale on his account, accompanied by a letter of the date of October 9th, 1818, advising of the shipment, in which letter, speaking of the consignment, he has this observation : " I believe you will think with me that it will be best not to hold on too long, as the new crops of cotton will be shipping in the course of a month or six weeks. " I shall be well satisfied if this shipment produces net amount of invoice. I trust entirely to your good judgment in effecting sales, without fixing any limitation. The proceeds please return in brandy, the same as Messrs. Bogert and Kneeland order for the proceeds of the shipment by the same vessel."

By a letter from the defendant to the plaintiffs, of the 10th of October, 1818, he observes that it was very likely he might spend part of the then ensuing winter in Georgia or New-Orleans, and he therefore requested them to invest the proceeds of his cotton in brandy, the same as Messrs. B. & K. had ordered for their account, and include it in the same bill of lading consigned to them, making at the same time a distinct invoice for his parcel.

The cotton arrived to a dull market, and the prices were merely nominal. The plaintiffs held the defendant's parcel at the price which had been obtained on the last sales, at which it was offer-

ed, but no sales were effected. But eighteen pipes of brandy were shipped by them to the defendant, in anticipation of the proceeds of the cotton, and charged to the defendant's account. The brandy was invoiced as a shipment for the account and risk of the defendant.

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The cotton remained a long time on hand unsold; and after various ineffectual efforts to dispose of the same, of which the defendant was constantly kept advised, and his advice and special direction solicited for their government, sales were finally effected of ten bales at reduced prices, and accounts of the sales rendered by the factors. The remaining seven bales being wholly unsaleable at Nantz at any price, were sent by them to Lisle for a market. At the trial, the defendant failed in his claims to charge the factors with the value of the cotton in controversy, the Court being of opinion that they had been in no default: and in the form the controversy took, the question between the parties was finally reduced to the sufficiency of the proof of the sale of the seven bales sent to Lisle, and the prices for which the same were sold.

A long correspondence between the parties, consisting however, almost exclusively of letters from the plaintiffs to the defendant, was in evidence; but it is not material to this motion to give the dates or contents of any of these letters, except those of the 7th May, 1822, and 26th March, 1823, which were made the subject of special exception. The letter of the 7th May, 1822, advised the defendant of the sale of the seven bales of cotton sent to Lisle by the plaintiffs' correspondent at that place, for \$190; this letter professes to enclose account sales of the whole consignment of seventeen bales, and a copy of the account sales made at Lisle, and advises the defendant of a draft upon him for \$1267 25-100 at sixty days, as the balance of the account against him. The letter of the 26th March, 1823, which closes the correspondence, complains of the defendant's silence, and of the dishonour of the plaintiffs' draft upon him for the balance of the account, and informs him that powers were sent to Bogert and Kneeland to collect the amount.

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Annexed to the deposition of Bellaire, the plaintiffs' clerk, taken under a commission, was an account abstracted from the plaintiffs' books, purporting to be an account of the sales and proceeds of these seventeen bales of cotton, giving a detailed account of the items and particulars of the sales of the ten bales sold at Nantz; but the general results, or net proceeds only of the sales of the seven bales at Lisle.

At the trial, this deposition, and the letters from the plaintiffs to the defendant, were offered in evidence by the plaintiffs, and Henry Kneeland was produced as a witness, who testified that during the winter after the shipment, he was requested to urge the defendant to give further instructions about his cotton, on account of the difficulties in the market; that he did so urge him on various occasions; that the defendant gave no positive answer, but left witness under the impression that he would write. No evidence was given of the sale of the seven bales of cotton sent to Lisle, except the plaintiffs' letters of the 22d May, 1822, and 26th March, 1823, and the accounts abstracted from the plaintiffs' books. But Henry Kneeland testified, that after the sales were all closed, he handed the accounts to the defendant, who made no objection to any of them, merely saying that the plaintiffs had violated their instructions by holding on too long.

The defendant's counsel objected to the testimony taken under the commission, and which comprised the copies of the letters of the plaintiffs, and the accounts abstracted from the books of the plaintiffs, as being illegal and improper evidence to be submitted to the jury, touching so much of the account dated Nantz, 17th May, 1822, as related to the seven bales and packs of cotton in the said account mentioned as having been sent to Lisle; and insisted that there was no legal evidence of the sale of the seven bales and packs at Lisle, and that the letters were not evidence of the facts contained in them. The Judge ruled that the letters were not evidence of the facts contained in them, but were notice of such facts, which might bind the defendant by his assent and acquiescence: and that as to the sale at Lisle, *the letters and the rendering of the accounts, and the answers to Mr. Kneeland*, were facts to go to the jury from which they might find such sale; that

at all events, it was a question for them under the evidence, whether they were satisfied that such sale had taken place, and he so instructed the jury, who found a verdict for the plaintiffs.

The material question is, whether the Judge was correct in his opinion and direction to the jury, that the letters of the plaintiffs were legal and proper evidence for them to take into the estimate in deciding upon the fact of the sale at Lisle. These letters were the written declaration of the plaintiffs themselves, and would seem to come within the rule which excludes a party to the suit from testifying in his own favour. The plaintiffs could not have been received to testify on oath to the matters stated in their letters, and to admit the letters themselves as evidence of these matters, would be to give to a statement which has not the sanction of an oath, a credit in a court of justice, to which the same statement would not be entitled, if in the form of a deposition. The fact in dispute, was the sale of the seven bales of cotton at Lisle. The best evidence of that fact would have been the deposition of the agent, who made the sale, or of some clerk, agent, or other person at Lisle, who was conusant of it. Such testimony is always desirable, where any question is made of the fact, or any collateral matters may be subjects of inquiry, because it opens the field of investigation by the cross-examination of the witnesses. The mere accounts of sales are not competent evidence of the fact of sale ; they may be fictitious, or the mere cover of a fraudulent or indefensible disposition of the goods. The silence of the party to whom they are rendered, and his acquiescence in them, may be evidence to a jury of his tacit assent to their reality and correctness, and may be held to conclude him. No actual proof of the fact of sale was made in this case. The substitute for it was the letters in question, and the testimony of Henry Kneeland.

Were the letters admissible, or could they in a legal sense have any weight in the scale of proof ? And if not, could the direction of the Judge be correct, that from those letters, and the testimony of Kneeland, the jury were to form their conclusion upon the fact ? These letters were well calculated to make an impression upon the jury, and if allowed the influence of legal

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proof, they must have been of decisive weight. They averred the fact of the sale in positive terms, and the writer of them was proved to be a man of integrity, and entitled to full credit for veracity. The jury, upon written evidence emanating from such a source, and so clear and explicit in its character, could not doubt or hesitate upon their verdict. If, then, those letters were illegal or inadmissible evidence for the proof of that fact, the Judge erred in the direction he gave, and the jury have acted under improper influence in coming to the result they did. It follows that a new trial must be granted, unless some redeeming circumstance has cured the fault, and given efficacy to the judgment of the jury.

It was contended that the other evidence in the cause was sufficient to establish the fact of the sale, and that the verdict must have been the same without the letters, as with them ; and of that opinion is the Court. But notwithstanding the sufficiency of the proof of the rendition of the account to the defendant, and his answer to Kneeland, to establish the fact of the sale, and the correctness of the account of it, or such an implied admission of those matters, as to dispense with other proof, and entitle the plaintiffs to a verdict, yet the admission of improper evidence, and the direction of the Judge to the jury, to take the illegal as well as the legal evidence into consideration in deciding the question, on the authority of the case of *Marquand v. Webb*, [16 Johns. R. 89.] would vitiate the verdict.

In that case, B. Gomez, a part owner of a privateer, was admitted as a witness to prove that the defendant, who was sued for the expenses of repairs to the vessel, was also a part owner of her. Two other witnesses testified to the same fact, one of whom, a Mr. Briggs, the subsequent purchaser of the vessel, expressly proved that the defendant and others were the owners at the time of her repairs. The Court held that Gomez was an incompetent witness, and though the fact proved by him was proved by two other witnesses, they could not say that his evidence might be rejected as unnecessary ; and as it appeared in the case, it vitiated the verdict, and the judgment was reversed, with directions that a *venire de novo* issue in the Court below.

The principle, as stated by SPENCER, C. J., in the form of a quære, was, that if improper evidence is admitted, though the other evidence may, in the opinion of the Court, be fully sufficient to entitle the plaintiff to a recovery, the verdict must be set aside, because the Court is not authorized to say that the jury disregarded the improper evidence. If that case be law, and the principle it established be sound, how can this verdict stand? Suppose the other evidence in this cause, to establish beyond a doubt the fact of sale, and the justice of the account, still the letters, the written declaration of the plaintiffs, were admitted, and the jury directed to consider them as part of the evidence to prove that fact. And if that evidence was inadmissible for that purpose, it vitiates the verdict; for we cannot know what weight was attached to it by the jury, nor how far it governed their opinion.

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It may perhaps be proper to advert to the passing remark of Chief Justice MANSFIELD on this point, in *Horford v. Wilson*. [1 *Taunton*, 12.] In that case, parol evidence was admitted of the contents of a letter from the holder of a bill of exchange to the drawer giving him notice of the dishonour of the bill, the letter itself not being produced at the trial, nor any notice given to the defendant to produce it. Other evidence was produced by the plaintiff fully sufficient for the jury to presume notice, and it did not appear that the defendant had objected to the parol proof of the contents of the letter at the trial. But it was made the foundation of a motion for a new trial, and the Chief Justice upon the argument when the point was opened, interrupting the counsel, observed that he did not remember that any such objection was made upon the trial, and adds this remark, "neither will the court set aside a verdict on account of the admission of evidence which ought not have been received, provided there be sufficient without it, to authorize the finding of the Jury." No such notice is taken of the point in any part of the argument, or in the decision of the court. This dictum, for surely such must be its true appellation, must be understood in reference to the facts of the case, and to mean, that the admission of *secondary evidence*, or

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of such, which if objected to would have been excluded, but which was not objected to, is not a sufficient cause to set aside a verdict when the other facts in the cause were sufficient to support it: and the utmost to which the Chief Justice can be supposed to intend to carry his position, is, that there may be cases of the admission of evidence which ought not in strictness to be received, where the verdict if otherwise sufficiently sustained will be suffered to stand. The learned Judge could not intend to affirm as a general proposition, that illegal evidence, improperly admitted by the Judge against the objection of the party, will not in any case vitiate the verdict, if the other evidence in the cause is sufficient to entitle the plaintiff to recover, or if he must necessarily be so understood, his opinion is in direct conflict with the decision of our own Supreme Court in a case which turned solely upon that point, and his authority, must in this court yield to that of our own Judges.

The case of *Marquand v. Webb*, does not rest upon the authority of the Supreme Court alone. It was confirmed by the Court for the correction of errors and made the basis of the decision of that Court in the case of *Osgood v. The Manhattan Company*. [3 Cowen R. 612.] Suydam, senator, who delivered the only opinion given in the case, referring to the case of *Marquand v. Webb*, expresses his concurrence in the principle it established. It is well settled, he says, that if improper evidence be given, although it may be cumulative only, the judgment must be reversed, for we cannot say what effect such evidence may have had on the minds of a jury, and he refers to the case of *Marquand v. Webb*, as a decisive authority upon the point. I am compelled therefore to come to the conclusion that the verdict must be set aside, though I see no reason for supposing that there can be a different result from another trial.

*New trial granted.*

**NOTE.**—Notwithstanding the case of *Marquand v. Webb* [16 J. R. 89] and that, *Osgood v. The Manhattan In. Co.* [3 Cowen's R. 612.] there seems to be something unsettled as to the principal point of the case above decided. See 4 Wend. R. 456. *Supervisors of Chenango, v. Birdsall*. See also the case of *Doe, dem. Lord Teynham v. Tyler*, 6 Bingham, R. 561. The marginal note of the latter case is as

follows. "The Court will not grant a new trial on the ground that evidence has been admitted which ought to have been rejected, if, exclusive of such evidence, there be enough to warrant the finding of the Jury."

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### GEORGE BIRKBECK, versus SILAS E. BURROWS.

The plaintiff by a contract in writing, agreed to "make and complete" for the defendant a steam engine, which he warranted against "ordinary ware" for the space of sixty days. After the engine was delivered, repairs were made upon it by the plaintiff, for which he brought an action of *assumpit*. At the trial the defendant set up an *award* in his defence, and insisted that *all* matters in controversy between himself and the plaintiff had been submitted to an arbitrator. The award was not accompanied by any *submission*, and the plaintiff was permitted to call the arbitrator to prove that the submission, did not embrace the claims for which this action was brought. HELD, that as the submission was by *parole*, and as the award did not in terms cover all matters in controversy between the parties, the evidence of the arbitrator to shew what the matters submitted were, was rightfully admitted.

It having been proved by the plaintiff that the defendant had offered him a certain sum to settle the controversy between them, the defendant produced a copy of a letter from himself to the plaintiff, explanatory of that offer. The writing was excluded by the presiding Judge, but the defendant was permitted to prove the fact, that he had made such a communication. HELD, that the testimony thus offered by the defendant, being in effect his own declarations, was rightfully rejected.

The arbitrator testified that when the parties were before him, a bill was presented specifying the accounts submitted; a copy of which he transmitted to the plaintiff, accompanied by the award: but the plaintiff denied that the account was received by him. HELD that the plaintiff was not thereby precluded from introducing other evidence as to the items of his claims, unless the defendant could shew that the account came into his possession or under his control.

The defendant offered to shew what articles enter into the composition of a "complete steam engine" and that many of those embraced in the plaintiff's bill were of that description. This evidence was excluded by the presiding Judge, and his decision was held to be correct.

The Judge charged the jury that the *award* was conclusive as to every thing which had been *submitted*: and left them to say whether the items of the present claim had been before the arbitrator or not. If they had, then that their verdict should be for the defendant; but if they had not, then that their verdict would be for plaintiff. That by the agreement between the parties, the plaintiff was bound to make good all damages to the steam engine arising from ordinary wear

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for the space of sixty days : and that if any of the present charges were of that kind, they were to be excluded from the account. Held that the charge and ruling of the Judge were in all respects correct : but the jury having found a verdict for \$925 43, in favor of the plaintiff, it was set aside (on payment of costs by the defendant) upon the ground that substantial justice had not been done to the defendant.

Where a new trial is granted, not from any mistake or misdirection on the part of the Judge, but in consequence of an error or incorrect finding by the jury, the party moving to set aside the verdict, is bound to pay the costs.

THIS was an application for a new trial on the part of the defendant. The action was originally brought to recover the amount of a bill, for work done and repairs made upon a certain steam engine and steam boat belonging to the defendant ; the declaration containing merely the common counts in assumpsit for work, labour and materials.

The cause was tried before the Chief Justice. At the trial the plaintiff gave in evidence his books of accounts, from which his bill of particulars had been copied, and called witnesses to prove the performance of the services, and the correctness of his charges.

The account commenced on the 9th of April 1825, and ended on the 23d of July following. The plaintiff also called a witness who testified, that in the month of December 1825, he presented the plaintiff's account to the defendant for payment. That the defendant observed, that a part of it had been submitted to arbitration ; but he would pay five hundred and fifty dollars to close the concern, and settle the business. The defendant on his part offered evidence to show that the services for which the plaintiff sought to recover, had been performed under a written contract, to build and complete a steam engine for the defendant. That in consequence of some disagreement between the parties, their accounts had been submitted to an arbitrator by mutual consent ; that the arbitrator had made an award in favour of the plaintiff, the amount of which had been paid by the defendant. And it was a principal subject of controversy, whether the submission to the arbitrator included all matters in difference between the parties, or only certain specific

charges for extra work upon the steam engine, not embraced by the written contract.

The defendant gave in evidence the written contract between himself and the plaintiff, bearing date the 19th of August, 1824; wherein the latter had stipulated and agreed to make and complete a steam engine for the defendant, according to certain specifications therein contained, for a steam boat which he was then constructing. And by a further contract between the parties, dated April the 21st, 1825, the defendant agreed, "to guaranty the breaking and ordinary ware of the said engine, for sixty days :" provided it was not broken by some uncommon gale, or by running against some object.

The defendant also produced certain receipts shewing payments for the principal part of the engine, together with the following award of the arbitrator, viz : "Whereas Geo. Birkbeck "and Silas E. Burrows, having *certain* disputes and controversies subsisting, arising out of the charges and demands of the "said Birkbeck, against the said Burrows, relative to the steam "boat New-London, which controversies, disputes, charges and "demands, the said parties have submitted to my arbitrament "and award, and have made their allegations and proofs respect- "ively before me, now know ye, that having examined the mat- "ters submitted to me, I have ascertained and awarded and do "hereby award that there is due to the said George Birkbeck "from the said Silas E. Burrows on account of the premises the "sum of \$945 74, and I do award and order that the said Bur- "rows do in five days after notice of this award pay the said sum "in full satisfaction of all and singular the premises, and that "upon such payment, mutual releases be executed by the said "parties, the one to the other. In witness whereof I have here- "unto set my hand and seal this first day of September, 1825."

(Signed) O. H. HICKS, [L. s.]

On this award was endorsed the following receipt. "New-  
"York Sept. 5th, 1825. Received of Silas E. Burrows, for and  
"on account of George Birkbeck, nine hundred and forty five  
"dollars and seventy four cents in full.

(Signed) JNO. A. MOORE.

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1829.

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The plaintiff to rebut this evidence, called John A. Moore, as a witness to prove that the subject matter of the present suit had not been submitted to the arbitrator. To this evidence the counsel for the defendant objected: and it was ruled by the presiding Judge, that evidence as to the claims and facts actually put before the arbitrator at the hearing was inadmissible, *except for the purpose of showing what the submission was*; but that the plaintiff might inquire as to what the parties had agreed to submit to the arbitrators, the submission having been by parol; and that the arbitrator himself was the proper witness to prove those facts.

To this opinion the counsel for the defendant excepted.

The plaintiff then called the arbitrator, who testified that the submission was by parol and was "*of all claims for extra work to the steam boat New-London.*" That a bill was laid before him specifying the accounts submitted, and that the items therein were the only matters on which he acted. He understood the submission to embrace all claims and matters of account between the parties up to the time of the submission, and thought that the account contained charges for extra work upon the engine. Nothing was said of any other matters of account not included in the submission; and the witness gave a copy of his award *together with the plaintiff's account* to his son, with directions that they should be handed to the plaintiff. The son of the witness was now dead, and he could not say whether the papers ever reached the plaintiff, or not.

The counsel for the defendant here called for *the account*, as containing the best evidence of what had been submitted. But the plaintiff alleged that it had never been received by him.

The plaintiff also produced witnesses to prove, that the matters submitted to the arbitrator, were altogether for *extra work* upon the steam engine and not for repairs; and that the controversy was then confined to the question whether such extra work was within the contract to construct the engine, or not.

The defendant then offered in evidence a copy of a written communication from himself to the plaintiff, relative to the present claim, bearing date the 4th of April, 1826: but this evidence

was overruled by the presiding Judge, who, however permitted the defendant to prove the fact, that such a communication had been made. The defendant also offered evidence to show what articles were necessary, to make a complete engine within the contract, and that some of the articles charged in the present bill, were of that description.

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v.  
Burrows.

This evidence was also excluded by the Judge, who charged the jury, that the award was a final bar to every claim submitted to the arbitrator; but as to *what had been submitted*, that was a question of fact for them. That the account laid before the arbitrator, would, if in evidence, be conclusive upon that point; but as it had not been produced, the Jury must decide upon the testimony before them, as to the charges which had actually been submitted to the arbitrator. That if the charges contained in the present bill, had been included in the former account, their verdict would be for the defendant, otherwise for the plaintiff. That if the Jury should be satisfied that the charges in the present bill, *up to the time of the award*, were included in the account submitted, and that the *residue* was not so included, then the *time* of the submission would become material. That the testimony upon this point, was not sufficient to fix that time with precision, and if the jury could not be satisfied as to this, then that the defendant's own offer to pay \$550 would be perhaps the most equitable rule of damages. But upon all these points, the decision was left to their discretion. The jury were also charged, (upon the legal effect of the contract to keep the boat in repair,) that the plaintiff was bound to make good all damages arising from the breaking of the engine from ordinary wear, for the space of sixty days; and that they were to say whether any of the present charges fell within that contract, if they did, then such charges were to be deducted.

The jury returned a verdict in favor of the plaintiff for nine hundred and twenty five dollars and forty three cents; and the defendant now moved for a new trial.

Mr. D. Graham and Mr. Ogden Hoffman for the defendant, and in support of the motion, contended—

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1828.

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v.  
Burrows.

The plaintiff to rebut this evidence, called John A. Moore, as a witness to prove that the subject matter of the present suit had not been submitted to the arbitrator. To this evidence the counsel for the defendant objected: and it was ruled by the presiding Judge, that evidence as to the claims and facts actually put before the arbitrator at the hearing was inadmissible, *except for the purpose of showing what the submission was*; but that the plaintiff might inquire as to what the parties had agreed to submit to the arbitrators, the submission having been by parol; and that the arbitrator himself was the proper witness to prove those facts.

To this opinion the counsel for the defendant excepted.

The plaintiff then called the arbitrator, who testified that the submission was by parol and was "*of all claims for extra work to the steam boat New-London.*" That a bill was laid before him specifying the accounts submitted, and that the items therein were the only matters on which he acted. He understood the submission to embrace all claims and matters of account between the parties up to the time of the submission, and thought that the account contained charges for extra work upon the engine. Nothing was said of any other matters of account not included in the submission; and the witness gave a copy of his award *together with the plaintiff's account* to his son, with directions that they should be handed to the plaintiff. The son of the witness was now dead, and he could not say whether the papers ever reached the plaintiff, or not.

The counsel for the defendant here called for *the account*, as containing the best evidence of what had been submitted. But the plaintiff alleged that it had never been received by him.

The plaintiff also produced witnesses to prove, that the matters submitted to the arbitrator, were altogether for *extra work* upon the steam engine and not for repairs; and that the controversy was then confined to the question whether such extra work was within the contract to construct the engine, or not.

The defendant then offered in evidence a copy of a written communication from himself to the plaintiff, relative to the present claim, bearing date the 4th of April, 1826: but this evidence

was overruled by the presiding Judge, who, however permitted the defendant to prove the fact, that such a communication had been made. The defendant also offered evidence to show what articles were necessary, to make a complete engine within the contract, and that some of the articles charged in the present bill, were of that description.

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1829.

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v.  
Burrows.

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The jury returned a verdict in favor of the plaintiff for nine hundred and twenty five dollars and forty three cents; and the defendant now moved for a new trial.

Mr. *D. Graham* and Mr. *Ogden Hoffman* for the defendant, and in support of the motion, contended—

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1829.

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I. That parol evidence of the matters which the parties had agreed to submit to the arbitrator, ought not to have been received at the trial. It appeared, from the testimony, that there was no *written submission*; but the *award* was *in writing*, and recites the matters which were submitted. It is therefore not only the best evidence as to what was submitted, but it is conclusive unless impeached for corruption in the arbitrator. It expressly states, that the parties "having *certain* disputes and controversies subsisting," have submitted them to the decision of the arbitrator. This should be taken to mean *all causes of action*, subsisting at the time. The award contemplates a final end of all controversies; for it decrees that *mutual releases should be executed* by both parties. How then was any thing to be left for future litigation?

This is certainly better evidence of what was actually submitted, than any thing to be derived from the memory of witnesses, as such testimony must always be vague and uncertain. The recitals in the award therefore are evidence of the matters submitted, and should be deemed conclusive. [9 John R. 38: 12 J. R. 311.] The decree of the arbitrator, voluntarily selected by the parties, having been complied with on the part of the defendant, and the amount of the award having been received by the plaintiff, the award itself was conclusive upon the parties, and could not be opened.

But if this be not so,—if the award and its recitals were not conclusive evidence of every thing which was submitted, still the plaintiff was bound to produce the *best* evidence of what was submitted, because he had the power to produce *conclusive* evidence on this point, while the defendant had not. The account furnished to the arbitrator by the plaintiff himself, would have been conclusive evidence of every thing which the plaintiff claimed at the time of the award. That account was traced into the possession of the plaintiff, or into such a situation that it was a fair presumption that it was received by him. He therefore was bound to account for its non-production, before he could be allowed to go into other evidence of what the account contained. [10 John R. 363.]

II. Parol evidence as to what was claimed before the arbitrators ought not to have been received. [3. *Caine's R.* 167. 3. *John R.* 367. 2. *Bay's R.* 94.] But the copy of the defendant's letter to the plaintiff, relative to this very claim, and which was proved to have been delivered to him, ought to have been admitted at the trial. It would have had a material bearing upon that part of the plaintiff's proof which related to the confessions of the defendant, and would have shown that he never intended to admit the justice of the present demand in any shape. But if parol evidence was admissible to prove the plaintiff's claims, then the defendant ought to have been permitted to show what articles enter into the structure of a complete engine, that the jury might decide whether or not a part of the articles charged were of that description. Such testimony was offered at the trial, and rejected. It was competent for the defendant to prove these facts for the purpose of showing that the very articles charged in the present account were in truth, furnished under the contract. All the articles charged, were furnished after the boat was delivered; and the plaintiff was bound by the contract to keep the machinery in repair for sixty days thereafter. Under every aspect of the case, therefore, the testimony was proper, and ought to have been received.

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III. The jury were misdirected in being charged, 1. as to the legal effect of the award. 2d. In being charged that it was a question for them to decide, as to what had been submitted to the arbitrator. 3. In being told, in effect, that if they should not believe the charges now made were contained in the account submitted to the arbitrator, they must find a verdict for the plaintiff. As to the legal effect of the contract, the charge should have been, that it was the presumption both of fact and law, that all matters in controversy between the parties, which ought to have been submitted to the arbitrator, were contained in the submission. The weight of evidence upon the questions of fact, was on the side of the defendant; but the charge of the judge plainly intimates that the plaintiff was entitled to a verdict for something, and seems to take it for granted, that the defendant's offer to pay five hun-

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dred and fifty dollars, was evidence that *so much*, at least, was due to the plaintiff. This shews the impropriety of excluding the defendant's letter; for it will be observed, that the defendant, even by the testimony of the plaintiff's own witness, never admitted that *he owed* the plaintiff *any thing*; he merely offered to pay a certain sum to escape from a controversy with the plaintiff. The defendant by no means intended to admit that the *offer* was *proved*,—but if proved, he ought to have had the privilege of explaining it.

IV. Injustice has been done to the defendant by the jury, in their method of ascertaining the balance due to the plaintiff,—and there is important newly discovered evidence which entitles the defendant to a new trial. [The counsel for the defendant read an affidavit in support of the last point, and went into a minute examination of the testimony produced at the trial relative to the state of the accounts between the parties, for the purpose of showing that the verdict of the jury was erroneous and ought to be set aside.]

Mr. J. Anthon, *contra* for the plaintiff.

I. The bill exhibited against the defendant in this suit, was for repairing the machinery of the steamboat, after her delivery to the defendant; and the question is, whether any claims for *such repairs* were ever submitted to the arbitrator. The plaintiff contends, that the matters submitted, related exclusively to *extra work*, in constructing the steam engine; for *original work*, beyond that required by the contract, and such as the experience or fancy of the defendant called for. It is evident that the award is no bar to the plaintiff's claims, if it shall appear that they were never *submitted* to the arbitrator. How was the *plaintiff* to prove what the subjects of the arbitration were? At the trial, the *defendant* introduced the award, and the plaintiff called for the *submission*, because an award without a submission is a mere nullity.

It appeared, from the testimony of the arbitrator himself, that the submission was by parol, and it surely was competent for the plaintiff then to shew what the subjects of the submission were that he might thereby prove that his present bill had never been before the arbitrator, and that the present claims had never been submitted to him by the parties for his award.

The whole question then turns upon the inquiry whether the award is conclusive or not. It is undoubtedly conclusive if it embraces the subject of our present claim ; but the award in its terms does not comprehend *all* matters in dispute. It recites *certain* controversies, and leaves the plaintiff to show what those controversies were. There are two classes of cases presented by the books : one of *all demands* between the parties ; the other of *all matters in difference*. The first includes all claims up to the time of the award, but in the other it must be shown what the matters in difference were. [4 D. & E. 146, *in notis.* 12 John. R. 312. Starkie on *Evi.* book 4. p. 139. 4 Esp. R. 180. 16 John. R. 136. *Phillips v. Bennick.*]

In the present case how were we to ascertain the subject matter of the submission except by parol proof ? If we refer to the award, we are left to the same rule, for that speaks only of "*certain disputes and controversies.*" It is obvious therefore that it must be shown what those disputes and controversies were, and there was no way of showing them, except by parol proof. The award itself could not bind beyond the submission, and we proved to the jury that our present claims were never submitted to the arbitrator. They could not have been submitted, for they were not then the subjects of *dispute*, and those facts we had a right to prove. Upon these points therefore the presiding Judge was undoubtedly right, and the evidence was all properly admitted.

II. The contents of the written communication from the defendant to the plaintiff were properly excluded ; for if admitted, it would enable the party to *make* evidence for himself. If proved, nothing would be shown but the defendant's declarations in his own favor, which can never be admitted as evidence. The fact that the communication was made, the defendant did prove ; he

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had all the benefit of the inference to be derived from that fact and could not complain that the rules of evidence were not extended further.

III. The testimony which the defendant sought to introduce for the purpose of showing what articles go into the construction of a complete engine, was properly excluded, because entirely foreign to the controversy. This action is brought for *repairs* alone; how then could the defendant be allowed to prove, what the plaintiff ought originally to have *made*?

IV. The whole case was submitted to the jury upon terms most favorable to the defendant. The charge of the Judge, was perfectly impartial upon all the questions of fact; but if it had not been, how could this court interfere with the charge for any supposed bias as to questions of fact? The jury have found that the plaintiff performed the services for which this action is brought; they have found that the questions relative to those services have never been submitted to any arbitrator, and that the defendant has never remunerated the plaintiff for his labor. They have also found, that our claim is for repairing machinery previously constructed, and that by the terms of the contract, the plaintiff was not bound to make those repairs. If these facts are so, (and that they are, the court is bound to presume, being found by the jury) why should not the defendant pay the amount of the verdict? The charge of the Judge upon the contract was in favor of the defendant, for he told the jury that the plaintiff was bound to keep the engine in repair, for sixty days; and if the claim, in our account, were for the repairs required by the contract, then, that the plaintiff was not entitled to recover. We proved that they were required from the carelessness of the defendant's agents, and the jury have so found by their verdict. Every possible objection to the charge of the Judge is removed, and the defendant can only complain because the jury have found the *facts* against him. That finding was consistent with the law, the evidence and the justice of the case, and the verdict ought to be permitted to stand, for the amount found by the jury.

V. As to the newly discovered evidence, it was, at best, but cumulative, and could not lay the foundation of a new trial.  
[16 *John. R. Smith v. Brush.* 8 J. R. 84. 15 J. R. 220. 4 J. R. 425.]

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*Per Curiam.* The first ground upon which the defendant's application for a new trial rests, cannot be maintained. The award does not upon its face purport to cover *all* subjects in controversy between the parties; but it recites "certain disputes arising out of the charges of the plaintiff against the defendant, relative to the steam-boat New-London." It may be, that those controversies arose concerning matters entirely different from the charges embraced within the present claim, and as the submission to the arbitrator was by parol, the plaintiff had no means of showing what the subjects submitted were, except by calling witnesses; and if parol testimony was *admissible*, the arbitrator himself was not only a competent, but the best witness to be produced. The award is not upon its face, or by its terms, conclusive as to the matters submitted; but it is sufficient to cast upon the plaintiff the burthen of showing what the matters in dispute were which the arbitrator had before him, and that the present claims were not included in the submission or embraced by the award. The submission, it appears, was by parol, and the plaintiff could not therefore introduce any thing but parol evidence as to the matters submitted. By calling the arbitrator as a witness, he furnished the best evidence in his power, and that evidence was rightfully admitted. The award would of course have been conclusive, if it had embraced the subject of the plaintiff's present claims, and the fact as to whether it did, or did not embrace those claims, was properly submitted to the jury. Upon this point, therefore, the decision of the Judge at the trial was entirely correct.

As to the excluding of the written communication from the defendant to the plaintiff, we can see no error in that. Its contents, if proved, would amount to nothing more than a declaration made by a party in his own favour, and the defendant had all the benefit which he could rightfully claim from the writing as evi-

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dence. He was permitted to prove the fact that he had delivered to the plaintiff the written communication, and as it was not produced by him, all the inferences to be drawn from the withholding of it, were in favour of the defendant.

With regard to the account furnished to the arbitrator,—it would undoubtedly have been the best evidence to show, whether the items of the present claim were embraced in the former submission or not; and it would be very desirable to obtain that account if it were practicable. But it would be going too far to say, that the plaintiff should be precluded from offering any evidence of his demands, because the arbitrator had placed the account in the hands of his son, with directions that it should be delivered to the plaintiff. The person who received the account was not the agent of the plaintiff, and as there is no proof that it was delivered to the latter, or put under his controul, he could not be precluded from offering the best evidence in his power as to the nature, items, and amount of his claims.

Neither do we perceive any error in the charge of the Judge to the jury. His construction of the agreement between the plaintiff and the defendant, was undoubtedly the correct one; and all the questions of fact were fairly submitted to the jury. But in their *finding*, upon the evidence, there is reason to think that they have not done substantial justice to the defendant. The account, as presented by the case, shows that the jury have either misunderstood some parts of it, or that they have made an erroneous application of the evidence to the matters before them. It is evident, on inspection, that the plaintiff has been allowed for many articles which he was bound to furnish under his agreement to keep the engine in repair, and for them the defendant cannot be made responsible. Upon the whole, we can perceive no error either in the charge to the jury, or in the ruling of the Judge as to the evidence; but we think the verdict excessive and erroneous. We shall therefore set it aside, and direct a new trial, upon the payment of the costs by the defendant.

Where a verdict is set aside upon the ground of error or mistake on the part of the jury, according to the established practice,

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the party moving for the new trial, is bound to pay the costs, and in this case they must be paid by the defendant.

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*New trial granted on payment of  
costs by the defendant.*

[E. Anthon, Atty for the plif. D. Graham, Atty for the def.]

—  
GABRIEL L. LEWIS AND HORATIO G. LEWIS

versus

WALTER STEVENSON.

Where personal property has been mortgaged, the possession may in some instances remain with the mortgagor; especially where such a course is rendered proper and expedient from the nature of the property, and the objects of the parties in making the mortgage.

But if the mortgagor, while in possession, sells or pledges the property to a bona fide purchaser, or pledgee, who is ignorant of the mortgage, and has no cause for suspicion or inquiry, and delivers the possession, the sale or pledge will be good, and the rights of such a purchaser or pledgee are paramount to those of the mortgagee.

The defendant, a pawn-broker, advanced certain sums of money to a son of the mortgagor, for the use of the family of the latter, and inadvertently received plate, linen, &c. in pledge, which had been conveyed to the plaintiffs by way of mortgage, and neglected to make any inquiry as to the authority of the pawnee, although there were circumstances to excite suspicion. *Held*, that the mortgagee had a right to reclaim the property out of the hands of the pawn-broker. Where personal property is put into the hands of trustees, by a borrower of money, as security for a loan made to him, by a third person, an appropriation by the trustees of a part of the proceeds of the property, to an object not expressly mentioned in the deed of trust, made with the assent of the borrower and the lender, cannot be questioned by the parties to the loan.

This was an action of *indebitatus assumpsit*, brought to recover from the defendant, (who was a pawn-broker,) the sum of nine hundred and fifty-two dollars and eighteen cents, which

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had been paid to him by the plaintiffs, in order to redeem certain articles of plate, linen, &c., which had been pledged to the defendant as security for loans made by him thereon, but which the plaintiffs insisted belonged to them, and were not the property of the pawnier.

The declaration contained the common counts for money, and a count for goods sold and delivered. Plea, the general issue.

The action was brought in this form in order to try the title to the property, and the defendant gave a receipt, wherein he acknowledged that the sum claimed by the plaintiffs, had been paid to him, by them, as the amount due on the goods pledged, which were surrendered up to the plaintiffs. The receipt further stated, that the defendant insisted that the property redeemed belonged to the person who pledged it, but that the plaintiffs claimed it as their own, and the parties, in order to avoid the necessity of an action of trover, had agreed to take this course without prejudice to the legal rights of either.

The cause was tried before the Chief Justice on the second of February, 1829; and the counsel for the plaintiffs, in stating their case to the jury, observed, that they did not wish to impeach the conduct of the defendant in relation to this transaction in any way, it having been, so far as they knew, frank and fair; but that the claim which they interposed to the goods, was founded upon a legal right, which it was the object of this action to assert and maintain.

They then introduced a bill of sale under seal, bearing date the 13th of November, 1826, executed by Samuel G. Ogden to the plaintiffs, together with an inventory or schedule of goods thereby assigned, which was annexed to the deed. This assignment purported to be for the consideration of the sum of \$5000 paid by the plaintiffs to Ogden, and on its face conveyed to them *absolutely* the goods, chattels, and household furniture mentioned in the schedule. But in connexion with this instrument, the plaintiffs produced a declaration of trust made by them under seal, bearing even date with the bill of sale, and the due execution of both instruments was admitted.

The declaration of trust recited, that Samuel G. Ogden was indebted to the United States of America for duties on certain goods before that time imported into the city of New-York by him, and for which he had given two bonds for the sum of \$1644 each, which he was unable to pay. That Thomas W. Ludlow, of the said city, had agreed to advance and provide the funds and means for taking up and paying those bonds, and had further agreed "to advance monies for the contingent and family expenses of the said Ogden from time to time, as might be required;" and that Ogden had conveyed all his household furniture, together with the furniture of his counting-house, in Wall-street, (as per schedule, &c.,) and a certain indenture of lease for an unexpired term of the house No. 41 Warren-street, in the city of New-York, to the plaintiffs. That although said bill of sale and assignment were in terms absolute and unconditional, yet they were in fact made *in trust*, to secure and pay to Ludlow, *on or before the first day of May, 1827*, the amount of the said two Custom-house bonds, which he had agreed to take up; and also such further and other sums as might be paid by him "*as aforesaid*," together with interest on such payments. The plaintiffs in the declaration of trust, then further stipulated with Ludlow that they would hold the said property and premises for the purposes mentioned, and that if the money advanced by him to take up the Custom-house bonds, and for the contingent and family expenses of the said Ogden, together with interest thereon, should not be refunded to him on or before said first day of May, that then the plaintiffs would *forthwith* sell and dispose of the property assigned, either by public or private sale, as should be deemed best, and out of the proceeds, reimburse Ludlow all such sums as he might advance, together with interest, &c.

It was admitted by the defendant, that the goods pledged to him and surrendered up to the plaintiffs under said stipulation, were a part of the articles transferred to the plaintiffs by Ogden and mentioned in the schedule annexed to the bill of sale.

It appeared at the trial that Samuel G. Ogden was a merchant, resident in the city of New-York, who had been engaged in extensive transactions of business in France, and that having become

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embarrassed in his affairs, it became necessary for him to visit that country, in order to bring his business to a close. To accomplish this purpose, he obtained a letter of license from most of his creditors, but wishing to make provision for the payment of the bonds mentioned in the bill of sale, and also to furnish funds for the support of his family during his absence, (which, it was supposed, would not be extended beyond the first of May, 1827,) he made application to Ludlow for assistance; and that Ludlow, in order to befriend Ogden, agreed to furnish the means of paying the two bonds mentioned in the bill of sale, together with other funds for the family of Ogden; but his advances were not to exceed the sum of four thousand seven hundred and fifty dollars. For the purpose of making Ludlow secure, the furniture and lease mentioned in the bill of sale and declaration of trust, were transferred to the plaintiffs; but the expectation then was, that Ludlow would borrow the money upon his own notes, and that Ogden would be able to provide the means of taking them up as they fell due, and of reimbursing Ludlow before the first day of May, 1827, whereby there would be no necessity of enforcing the trust, or of selling the property transferred.

Owing to various embarrassments, the absence of Ogden was prolonged in France far beyond the period contemplated, and Ludlow was consequently compelled to pay his own notes when they fell due. Ludlow, on the 15th of January, 1827, had advanced to the plaintiffs as trustees the sum of \$4740 12 : viz., on the 13th of November, 1826, \$2350; on the 6th of January, 1827, \$1669 48 ; and on the 15th of January, \$720 64.

It appeared that Ogden, previously to his departure for France, had been arrested for a debt due to Brainerd & Kimberly, and that the plaintiffs became his bail. This debt (amounting to \$415 18) was paid by the plaintiffs out of the money received of Ludlow, after Ogden's departure for France. His attorney had stated to him the necessity of providing for this debt before his departure, and he answered, that the plaintiffs would be protected by the assignment.

Ogden, at the date of the bill of sale, was indebted at the Custom-house on other bonds besides those mentioned therein;

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and on one of them, (which was for the sum of \$134 13) *one* of the plaintiffs, (G. L. Lewis,) was surety. This bond, together with another for \$1,644, and one for \$1,814 93, the plaintiff paid, when they fell due, out of the money received of Ludlow.

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This last bond, it appeared by the testimony of Ogden himself, was *one* of the bonds which the parties intended to describe in the bill of sale, and which was to have been protected by it; but the defendant contended, that the plaintiffs were not justified in paying either this bond, or that for \$134 13, or the debt upon which Ogden was arrested; because *they were not embraced in the bill of sale and declaration of trust.* The plaintiffs also paid to the family of Ogden the sum of \$706 during his absence, and no more; but the defendant alleged, that the whole sum received of Ludlow, beyond the amount of the two bonds mentioned in the bill of sale, ought to have gone to Ogden's family.

Under these circumstances, the family of Ogden, during his absence, became distressed for the want of the means of support. They applied to the plaintiffs for money, but received nothing beyond the sum of \$706 before mentioned. They were therefore under the necessity of pledging to the defendant various articles of plate, linen, &c., embraced in the bill of sale, in order to raise money for their support, and the defendant advanced upon specific articles at various times, between the 5th of May, 1827, and the 7th of March, 1828, the sum for which this action was brought, and received the goods into his possession.

Ogden, before his departure for Europe, had given to one of his sons (S. G. Ogden, Jr.) a full power of attorney to act in his behalf upon all necessary occasions; and for the purpose of procuring money of the defendant, another of Ogden's sons (Morgan L. Ogden) pledged the property in question with the approbation of S. G. Ogden, Jr., and of his mother, who resided with the family during her husband's absence.

Morgan L. Ogden, it appeared, when he went to the defendant for money, acted openly and without disguise. Upon obtaining the first loan, (which was on the 27th of April, 1827,) he himself carried the articles pledged to the defendant, and the

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pledges were all made in the day time, but the defendant's clerk went to the house of Mr. Ogden for many or most of the articles *in the dusk of the evening*. The goods pledged were all marked with the initials S. G. O., and Ogden's name was on the door of his house at full length. The defendant did not however ask Morgan L. Ogden any questions as to his right to pledge the articles, nor did the latter ever communicate to the defendant any thing relative to the mortgage. The defendant's clerk saw some of the members of Mr. Ogden's family when he went for the articles pledged, but no inquiry was ever made after Ogden himself. When the defendant sent for the goods in the evening, he selected that time for his own convenience merely, and the business appeared to have been conducted in the usual manner.

The defendant, it appeared from the testimony, took it for granted that Morgan L. Ogden had a right to pledge the articles upon which the loans were made, and he never made any inquiry as to that right, either at the house of Ogden or elsewhere.

When Ogden departed for Europe, the furniture was all left in the hands of his family for their use and convenience in his house in Warren-street, and it remained there until the 26th of April, 1828, (except such articles as were pledged to the defendant,) when the plaintiffs were compelled to sell the same in order to discharge their trust and repay Ludlow. At the time of the execution of the bill of sale, however, there was a symbolical delivery of the furniture to the plaintiffs, in the presence of witnesses, by delivering one article in the name of the whole; but they never took actual possession until the time of the sale.

According to the plaintiff's statement, the amount advanced by Ludlow under the trust, and to the defendant, including interest, was \$6175 29, and the amount received from the sale of the furniture and lease, was \$5213 60, leaving a balance of \$961 69 due to Ludlow.

The defendant contested the right of the plaintiff to receive *in any event* under the trust, any sums beyond the amount of the two bonds specified in the bill of sale, and the money advanced for family expenses, together with interest thereon, amounting in the whole to the sum of \$4400 77, which would leave a balance of only \$55 98 due to them.

After the evidence was all disclosed at the trial, the parties agreed that a verdict should be taken for the sum of \$1200 in favour of the plaintiffs, subject to the opinion of the Court upon a case to be made ; and that, in case judgment should be given for the plaintiffs, it should be entered up for such a sum as should be due to them, according to principles to be laid down by the Court; not, however, to exceed the said sum of \$952 18 with interest thereon. A verdict for the sum of \$1200 was accordingly returned by the jury.

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The above is an abstract of the facts as they appear upon the case. There were some objections made to some evidence introduced by the plaintiffs, especially to a certain correspondence between Ludlow and Ogden, and to a receipt given to the latter by the plaintiffs for money advanced. But as the whole body of the evidence was voluminous, and many of the facts not material to a correct understanding of the principles established by the decision, every thing but the above abstract (which is believed to be substantially correct,) is omitted.

The cause was argued by *Mr. Ogden Hoffman* and *Mr. Staples* for the plaintiffs, and by *Mr. Barnes* and *Mr. Anthon* for the defendant.

**Mr. Hoffman contended—**

I. That the assignment vested the property in the plaintiffs and by the terms of it, *being a mortgage*, the possession was to remain in the assignor. The assignment was not therefore fraudulent *per se*, and if there was actual fraud, the defendant was bound to prove it, there being nothing in the case as disclosed by the evidence, to cast any imputation upon the plaintiffs.

The mere possession of property, by itself, (as he contended,) proved nothing as such a possession might be perfectly consistent with the title of another person who was out of possession. Various attempts have been made, so far to change the law, as to protect the rights of those who obtain property fairly and innocently of the possessor and apparent owner; but these attempts have never been successful, as the law is always anxious to guard the rights

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of the *real* owner. The reason is obvious; the possession of a chattel is easily obtained, and if possession alone were sufficient to enable the party in possession, to pass the title for a valuable and *bona fide* consideration, the rights of property could not easily be protected. The statute of frauds applies to the case of *creditors* not purchasers, and the first section which speaks of *creditors* only is confined to real estate.

Our statute is a transcript from that of Elizabeth, and the decisions upon the latter are applicable to the former. The statute of James refers to nothing but cases of *bankruptcy*, and the decisions under that statute cannot be invoked to the aid of the statute of Elizabeth. No person can take advantage of this statute but *creditors*, and the defendant is not a creditor. But if he were a creditor, he could not destroy this assignment unless he could shew actual fraud, and that would be impossible in this case. The instrument of conveyance here is a mortgage for the bill of sale is to be coupled with the declaration of trust. The possession was left with Ogden, the grantor, for his benefit for a certain season, and was no evidence of any thing but of a disposition to befriend him. The goods were to be left with him as a matter of necessity, in some measure, as there was a confident expectation that he would be able to pay the amount for which his furniture was mortgaged and thus save the necessity of any change of possession. The transfer then was a mortgage, and the possession of Ogden consistent with the declaration of trust. It was not *void*, but voidable only, and even if the plaintiffs were bound to shew good faith and to account for Ogden's possession, they have done both. [Mr. Hoffman, on this branch of the cause cited and commented at length upon the following cases, viz : *Hartop v. Hoare, Bull, N. P.* 32-33. *Craig v. Ward*, 9 John. R. 197. *Bull, N. P.* 257-8. *Barrow v. Paxton*, 5 J. R. 261. *Kidd v. Rawlinson*, 2 B. & P. 59. *Strudel v. Phipps and Taunton*, 10 v. 145. *Sturtevant v. Ballard*, 9 J. R. 339. 8 Ib. 452. 3 Cow. R. 194. *Bissell v. Hopkins*. 4 Ib. 461. *Marsh v. Lawrence*, 7 Cow. 304. *Jackson v. Mather*, 3 Pick. R. 255. *Wheeler v. Train*, 1 Cranch. *Hamilton v. Russell*, 1 Peters, S. C. Rep. 448. *Conrad v. The Atlantic Ins. Co.*]

II. There was sufficient to put the defendant on inquiry, and he was bound to ascertain, or take some steps to ascertain whether the person offering to pledge the property had a right to do so, before he made advances upon it.

Mr. Ogden's son had no right to pledge property which had been transferred to the plaintiff, and his father would neither have done it nor approved of it, had he been in this country, because it was in violation of his agreement with Ludlow. True it is, S. G. Ogden, Jun. had a general power to attend to his father's business, but he had no power under it to pledge these goods—for his father, himself had no such power or right.

The defendant, in order to propitiate the favor of the court, must show that he has been injured without the means of avoiding the injury. This he cannot show, for although it was evident that Mr. M. L. Ogden was pledging the furniture of his father's house, yet he never inquired into his authority to do so. The name of S. G. Ogden was marked upon the articles pledged and yet the defendant is satisfied to receive property from a youth without the least precaution. The defendant's clerk went to the house of S. G. Ogden in the dusk of evening to receive the goods. He saw there various members of the family. Why did he not inquire who Samuel G. Ogden was, and why his son was acting in this matter alone? He had the means of coming at the truth, but he neglected them, and must therefore abide by the consequences of his negligence. The advances made by Ludlow were greater than the amount of the sales, including the goods redeemed from the defendant, and he is entitled to recover the whole sum paid to the defendant. [Mr. H. also cited and commented on the acts of the corporation of the city of New-York, passed in March, 1828, and January, 1829, relative to pawnbrokers, and the receiving of goods by them from minors and servants, and also in the evening. He insisted that the defendant had violated these ordinances, and was not entitled to any favor.]

The defendant relied upon the following points:

I. That the bill of sale from Ogden to the plaintiff not having been made to secure any pre-existing debt, but on the contrary,

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being expressly declared to be a security for such prospective advances as should be due and unpaid on the 1st day of May, 1827, could have no legal binding operation against third persons, without notice, *until that day*.

II. Therefore all *bona fide* sales and pledges accompanied by actual delivery of the articles, made prior to the 1st of May, would be good and available, notwithstanding the bill of sale. The pledge made to the defendant on the 27th of April, 1827, was of this description, and therefore available against the claims of the plaintiffs.

III. After the 1st of May, 1827, the plaintiffs having allowed the grantor to continue in actual possession, his successive acts of pledging to the defendant, without due notice of the transfer, were equally protected. Whatever might be the legal character of the transaction between the plaintiffs and Ogden, the instruments of conveyance being unaccompanied by actual possession, were void as to third persons, who advanced money upon the ownership inferable from such possession.

IV. One of the objects of the prospective pledge to the plaintiffs being the advance of funds for the contingent family expenses of the grantor, upon the refusal of the trustees to make such advances, a third party making them innocently on the authority of the grantor, and without notice is protected, for he claims, not *against* the assignment, but *conduct*; the advances made by him being applied to the purposes of the trust.

V. The pledging to the defendant was all of this character, and after the trustees had refused to make any advances to the family of Ogden.

VI. The possession and apparent ownership of the property by the family of Ogden, render the instruments of transfer to the plaintiffs fraudulent and void against *bona fide* purchasers and pawnees without notice.

VII. The defendant has at all events, a right to insist on a strict execution of the trust to its letter, and in that event the whole amount to be allowed against the property assigned, would be the sum of \$3289, the amount of the two bonds, and \$706 paid to the family for expenses; and these sums have been fully reimbursed to the plaintiffs from the proceeds of the sale of Ogden's property.

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*Mr. Barnes*, in support of these propositions, observed that he had not expected that any attack would be made upon the conduct of the defendant in relation to this transaction. The whole evidence upon which the plaintiffs grounded their charge of negligence, was to be found in the fact that the articles pledged were marked with the initials of the assignor, and the fault of the defendant consisted in his neglect to pry into the secrets of a most respectable family while in distress!

The plaintiffs had endeavored to fix upon the defendant the character of a *purchaser*, but he was in fact a *creditor*, who had lent and advanced money to Ogden upon the faith of a pledge. That the pledgor had power to make the pledge was evident from the fact that all the acts of Morgan L. Ogden were approved by his brother, who held his father's power of attorney. That power authorized him to do all needful acts, and what could be more necessary than his interposition to save the family from want? And could S. G. Ogden himself, have gainsayed this exercise of discretion on the part of his sons?

This claim may be disposed of without interfering with the course of authorities. The cases cited by the opposing counsel, are those where some *general creditor* of the assignor has come in to claim the property; but the defendant here stands upon different ground. He has lent his money upon a deposit of goods which were found by him in the hands of the pledger under such circumstances, as that it could hardly be *suspected* that they were in the possession of any other than the true owner. The furniture was in the house of Mr. Ogden where his family dwelt. That family exercised the exclusive right of ownership over it; and how could the defendant imagine that a third person had advanced a

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large sum of money upon a mortgage of the very property which he permitted the mortgagor to control freely and absolutely? If any person deserved to suffer, it was Mr. Ludlow, for he, by his negligent conduct, had enabled the family of Ogden to work a wrong upon an innocent person. By the terms of the trust the goods were to have been sold on the 1st of May, 1827, and yet they were suffered to remain in their original situation until April, 1828, and during all that time the mortgagor was using the property as his own. In the cases cited for the plaintiffs not one of the claimants was injured by any credit given upon the faith of the specific property. But in a case like the present, the bare possession of the vendor is evidence of fraud.

The general rule is, that the possession by the assignor of the goods assigned, is such evidence of fraud against general creditors, as will throw upon the assignee out of possession, the whole burden of showing the *bona fides* of the transaction; and he must account satisfactorily for his conduct in leaving his property in the hands of the assignor. If the assignee can show all this to the satisfaction of the court and jury, he may then sustain his claim against the attacks of *general creditors*. But no case can be found where his claim would be sustained against the rights of a person who had innocently and in good faith *purchased* the property of the assignor, finding it in his possession, or who had advanced his money upon the faith of the goods under like circumstances, the advance being at the same time accompanied by a delivery of the property pledged.

We are willing to subscribe to the law as laid down in *Bissell v. Hopkins*, and refer to the third position assumed by the counsel of Hopkins in that case. Chief Justice Savage expressly says, that one reason for protecting the mortgage there, was, that no person would be injured by that course. The mortgagor in that case obtained no *new credit* by his possession, and there the rights of no innocent claimant were injured. [Mr. Barnes here cited and commented on the following cases, viz: *Edwards v. Harben*, 2 T. R. 596. *Sturtevant v. Ballard*, 9 J. R. 338. *Meggott v. Mills*, L. Ray. 286. *Ryall v. Rolle*, 1 Wilson, 260. *Lempriere v. Paisley*, 2. T. R. 485. 1 Cranch. 309. *Hamilton v. Russell*, 1 Pow. on Mort. 2 chap.]

The plaintiffs at all events are bound to a strict observance of the terms of the mortgage. It was given for a specific purpose, viz: to provide a security for the sums necessary to take up the Custom-house bonds, and for money advanced to the family. Beyond these, the plaintiffs cannot claim, for they had no right to appropriate the money received of Ludlow to any other purpose. The mortgage was given for the protection of *Ludlow*, not for the benefit of the plaintiffs, and he had no right to incumber the property for any purpose but that expressed in the declaration of trust. If the plaintiffs be confined within these bounds, they have been paid already, and the defendant may retain in his hands all the money which he advanced for the wants of the family, for that was in furtherance of the trust.

After all, the question may come down to the simple fact as to negligence on the part of the defendant. And here we insist that there was nothing to put him upon inquiry. What was the property pledged? Household furniture consisting of plate and linen. In whose possession was it found? In the possession of a family of honorable standing, who would not be presumed to pledge the property of another person. By whom were they pledged? By the sons of the head of the family, whose good faith and authority were made evident from the fact that the defendant went to the house of Mr. Ogden to receive the goods. If the sons of the pledgor had acted surreptitiously, they would never have permitted the pawnbroker to come into the house, but would have carried the goods to him. Every thing was done openly, and with apparent good faith. There was nothing to excite suspicion, and the defendant acted not only with sufficient caution, but with the greatest delicacy and good feeling. The Court therefore are bound to protect his rights upon every principle of justice and of law.

*Mr. Anthon* on the same side:

I. When the mortgage was made, there was no debt due to the mortgagees; either to the plaintiffs or to Ludlow. The objects of the trust were prospective entirely, and all for the benefit of the

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grantor. Such a deed we contend is not to be favored, as it opens a door to fraud and deception.

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In the case of *Atkinson v. Maling*, [2 T. R. 462,] there was a prospective mortgage of a ship, and its evils were there pointed out. The Court were averse to the principles asserted by the mortgagee in that case, although they protected his rights, owing to peculiar circumstances attending his claim. So in *Badlam v. Tucker*, [1 Pick. R. 398,] the rights of the mortgagee were recognized for the same reasons ; but such deeds are subversive of the claims of honest creditors and against the spirit of the statute of frauds. [1 R. L. 75.] Our act is a transcript from that of Henry VII., and in my judgment renders this deed void *per se*.

Here there was a continued possession in the grantor, not only to the period when the deed became absolute, but down to the times when the various pledges were given. The motives of the parties to the assignment might have been pure and morally right, but all the consequences of a fraudulent intent on their part have been visited on the defendant.

In the first place there is no provision in the deed whereby the grantor was to retain possession, but on the contrary, the instrument itself made it the duty of the plaintiffs to take the possession. They were to protect the rights of Ludlow, and how could they be protected without possession ? Are not the plaintiffs in fact liable to him for the safe keeping of the goods ? And if they are, that proves that they were bound to take and maintain possession of the property assigned. But here the pledging commenced before the deed became absolute, and was continued down to the time when the plaintiffs vindicated their rights by actual possession.

Is then a mortgage, prospective in its terms, and entirely for the benefit of the grantor, to be favored or even countenanced by the Court ? If good in the outset, it may be continued for any length of time. It may be entirely secret while the mortgagor has all the appearance of wealth which the possession of property can give.

II. By the common law, a sale without possession is void as against creditors, and they are not bound to invoke the aid of any

statute. [*Daves v. Cope*, 4 *Bin. R.* 255. 1 *B. and P.* 87.] In this case the defendant is a creditor, not a purchaser. He is a creditor with surety, for he has the means of security in his hands. The property does not pass to the pawnee by delivery, and he cannot sell until condition broken or demand made upon the pawnner. The pawnner has a right to redeem, and may resume possession of his property at any time, by *paying his debt*. This clearly proves the pawnee to be a creditor, and not a purchaser, and he can avail himself of all the laws which have been made for the benefit of creditors.

The case of *Clow v. Woods*, [5 *Sarg. and Rawle's Rep.* 283,] points out the distinction between a pawn and a mortgage, and shows that the pawnee is merely a creditor with collateral security in his hands.

III. The next question is, whether this creditor has been guilty of any negligence in taking his pledge. The acts of the Corporation of the city of New-York, relative to minors and servants, may be laid out of the question, because there is no proof that M. L. Ogden was a minor. And even if he were, he acted under the authority of his mother, (to say nothing of his brother's power,) who was the lawful agent of the husband for this purpose. If the brother had no authority to pledge, the mother had, and she exercised her discretion to save the family from distress. What more could the defendant do than he actually did do? Suppose he had asked Morgan L. Ogden, or even Mrs. Ogden, as to their authority to pledge the furniture, would their words have been higher evidence of their authority than their *acts*? Or would they probably have offered to pledge this property, and at the same time have admitted to the defendant that they were acting without authority, and contrary to right? The defendant acted in a discreet, prudent, and decent manner, and it is not for these plaintiffs to throw upon him the imputation of negligence?

IV. The funds advanced by the defendant went to accomplish the objects of the trust which the trustees refused to fulfil. If the deed was valid, the trustees were bound to fulfil it. They,

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however, took the liberty to make advances for objects not contemplated in the deed. Could they do this, and defeat the objects of the grantor, in making a provision for his family during his absence?

It must be remembered that this action is brought by the trustees, and not by Ludlow. The trustees here must account for their actions, and if they have perverted the fund, they cannot make up any deficiency out of the defendant. They were not authorized to hold or sell the furniture for any thing but the payment of the two bonds mentioned in the bill of sale, and to repay Ludlow such sums as he might advance to the family. If Ludlow had in fact advanced the surplus beyond the bonds for the aid of Mr. Ogden's family, then his claims would have been at least equitable, if not legal. But here, both himself and the trustees refused to advance any thing beyond the \$706 for the family, and thus in fact disappointed the grantor, disobeyed the trust, and made payments in their own wrong. They cannot recover here, because they have received from the sale of the property assigned the whole amount which they have paid out on account of the trust.

*Mr. Staples* for the plaintiffs, in reply :

It is now well settled by authorities in our own Courts, as well as by the decisions of the Supreme Court of the United States, and those of the various States, that in a sale of chattels there is no such thing as fraud *per se*. Whether there has been a fraud or not, is a question of fact to be shown by such evidence as may point it out. The possession of chattels by the vendor, after they have been sold, may be an *indicium* of fraud, because it is not usual for the buyer to leave his goods in the hands of the seller. But he *may* leave them there without fraud, and circumstances often occur to render it highly proper that they should be so left. And if the buyer or mortgagee can show good reasons to the Court why possession did not accompany or immediately follow the transfer, he *may* by such proof take away every presumption of fraud, and leave the transaction fair and legal. It is true that

there may be cases where the law will presume a conveyance to be fraudulent, and fraud is a mixed question of fact and law. When the facts are ascertained, the law in some cases declares the existence of fraud as an inference of law. But where a conveyance has been made to trustees of household furniture by way of a mortgage, to secure the repayment of a loan made for the benefit of the mortgagor, *in presenti*, or where the mortgage is made prospectively to secure the repayment of a loan to be made *in futuro*, if the transaction be fair, honest, and *bona fide*, and without a design to withdraw the property from the reach of executions, then the law will protect the rights of the mortgagee. But every attempt to place the property of the assignor out of the reach of creditors for his benefit, is an actual fraud, by the statute, and the Court will frown upon every such dishonest transaction. [*Mackie v. Cairnes*, 5 *Cow, R.* 547. 1 *Hopkins' R.*] The cases cited by the defendant's counsel from the reports of Sergeant and Rawle, and from Pickering, do not apply to this case, which is an assignment, not for the benefit of the assignor, nor to screen his property, but to protect the rights of the assignee.

The case of *Atkinson v. Maling* turned principally upon the statute of James, not Elizabeth, from which ours is derived, and at all events cannot be pressed in to aid this defence. The principles of law upon which we rely, are laid down by our own Courts, and there can be no propriety in looking into nice distinctions, since we have established rules which must guide us in coming to a decision. It is perfectly clear, that unless the Court can persuade themselves that there has been actual fraud; unless they can believe that Mr. Ludlow has been guilty of gross imposition for the sake of benefitting Mr. Ogden, there can be no such thing in this case as *fraud*. Now the defendant does not assert this, but, on the contrary, he brings Ogden in as a witness to injure the claims of Ludlow, if that were practicable. We must assume, then, that Ludlow advanced his money *bona fide* upon the faith of the goods assigned to the plaintiffs, and that he has been guilty of nothing but the leaving of the furniture in the possession of the family of Mr. Ogden for their comfort and con-

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venience. Was there not a good reason for this? Ogden hoped when he made the assignment, to avoid the necessity of parting with his furniture at all. He hoped to be able to *redeem* his property, and there was no object between the parties but to furnish a security to Ludlow. And for what *purpose* was this assignment made? Was it to defraud creditors, and put property beyond the reach of executions? The very reverse was the fact. The furniture was pledged for the express purpose of raising a sum to pay the debts of the assignor, and the property was appropriated to the express object of satisfying bonds given to the government. The furniture has in fact been appropriated to the payment of Custom-house bonds, and it is of no consequence whether the sale of the goods preceded the payment or was made subsequently to it. The consequence is the same, the furniture has paid the debt.

But it is said that this is a case where a subsequent purchaser or pledgee has been injured by our misconduct. It cannot have escaped the observation of the Court, that this is a case rather between Ludlow and Ogden, than between the nominal plaintiffs and the defendant. Mr. Ludlow was certainly imprudent in making a large loan upon a pledge of *household furniture*, for he might have been sure, that the very act of enforcing the trust would have been considered an act of persecution by the party benefited. His kindness is forgotten, and these efforts are made to deprive him of his security. You might as well take a pledge of a man's wife and children as of his furniture, for it would in either case be considered by the pledgor as merely nominal.

If the defendant has given credit to Ogden upon the faith of property not his own, it is his misfortune. The law cannot relieve him unless there has been fraud on the part of the plaintiffs, or rather of Ludlow, who is here the actual party in interest. The question comes up at once as to the title of the property at the time of the pledge. In whom was it; in Ogden or in the plaintiffs? If in the former, then there is an end of the question, and if in the latter, the case is equally disposed of.

No man can impart any greater title to property than that which he himself has. Now it is evident that Ogden had im-

parted his title to the plaintiffs, and when he or his son attempted to convey this property to the defendant, they attempted to sell what was not their own. There is no way of protecting the defendant in such a case but by a due observance of the maxim made for him and others in his situation—*caveat emptor*. The Court cannot escape from the conclusion that the defendant received no interest in the property, except by deciding that the title to it remained in Ogden. Now this *could* not be, if the transaction between Ludlow and Ogden was honest, and of this there can be no doubt, for the defendant concedes this point.

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III. But if this were not so, there was enough to put the defendant on his guard. He need not have been injured if he had acted with due caution, or even with common prudence. If then the principle be correct, that the sale to the plaintiffs was void, *quoad* third persons who might innocently purchase of Ogden, no man can be deemed an innocent purchaser in the legal meaning of that term, who has the means placed before him of avoiding the injury which falls upon him. If the defendant, who could not but see that there was something uncommon in this transaction, had taken the ordinary precaution to make inquiry as to who, what, and where Mr. Ogden was, he would have avoided the taking of a pledge, which the party making it had no right to make. His misfortune is the consequence of his own imprudence, and this Court will not aid a negligent person who claims against another man's rights.

IV. There is another question remaining as to the extent of the trust, and that is a matter between the plaintiffs and the defendant. The plaintiffs were justified, at all events, in paying the bond for \$1814 13, as well as that for \$1644, because it has been proved that *that* was the bond which Ogden intended to pay. Ogden, therefore, could not question the conduct of the plaintiffs in this particular, and the defendant stands in his place as to this matter. Neither can the defendant question the amount paid to Brainerd and Kimberly, because Ogden declared that the assign-

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ment would protect that debt. At all events, the amount advanced by Ludlow is protected, and the plaintiffs are entitled to judgment for the difference between the amount received by him and that paid out, to the extent of the sum received by the defendant.

HOFFMAN J. It is too late to contend, that in a mortgage of personal property, the possession must, in all cases, be transferred to the mortgagee. It has been settled by repeated decisions of the Supreme Court of this State, and by other tribunals, entitled to the highest consideration, especially the Supreme Court of the U. S., that where there is a mortgage of chattels, the possession may, in many instances, remain with the mortgagor ; especially in those cases where the possession must *necessarily* so remain, from the nature of the property mortgaged, and from the objects of the parties in making the transfer. If those objects be fair and proper, and for a full consideration, then there is no fraud in the transaction, and without fraud the mortgage is not void. Neither is the position to be sustained that the transfer is *ipso facto* void *per se*, because the possession has been left with the mortgagor. If this were true, then there could be no such thing as a mortgage of chattels, —for the very idea of a mortgage, *ex vi termini*, implies that the possession is to remain with the mortgagor. Still it is too strong to say that possession by itself implies *nothing*, for it is *prima facie* evidence of ownership. It will throw upon a party who claims against it, or in spite of the possession, the necessity of showing the *bona fides* of the transaction, and will compel him to show why the possession was so left, and moreover to prove a proper consideration and an actual transfer.

In this case I can discover no fraud in the transaction as between the mortgagor and mortgagee. The transfer, in form, consists of a bill of sale and a declaration of trust, simultaneously executed, being in its legal effect a mortgage. Upon the face of the papers the object of the parties is apparent ; a legal consideration has been shewn, and every imputation of improper intention is removed. As between the mortgagor and mortgagee, therefore, this transfer is valid and cannot be impeached. Indeed, as between the mortgagee and the general creditors of the mortgagor, it

would not be obnoxious to the statute of frauds and would be upheld, unless the creditor could show fraud in fact.

But notwithstanding these general admissions it does not follow, that the mortgagor in possession, is so entirely devoid of title as that he can impart none to an innocent *bona fide* purchaser, ignorant of the mortgage,—there being no circumstance to put him on his guard, or excite inquiry. To carry the doctrine of the mortgage of chattels to this extent, would be opening a wide door to frauds, and might enable the reputed owner of covered property to cheat the innocent. The law in such cases will guard the rights of *bona fide* purchasers, and if there must be loss, will throw it upon the party who ought in justice to bear it. The mortgagee is under no *necessity* of taking such a security, and if he does take it, upon him lies the peril of fraud in the mortgagor, because he is the party who has reposed the trust and given the mortgagor the opportunity of injuring an innocent third person. And I wish it to be explicitly understood, that in the case of a sale of chattels by a mortgagor in possession, to an innocent purchaser, who conducts himself honestly in the transaction and has nothing to put him upon his guard,—in such cases, the rights of the innocent purchaser are superior to those of the mortgagee, and will be protected.

The general rule of law as to purchasers and pledges does not differ widely, although we do not consider the latter entitled to equal favour with the former. The pawnbroker, especially, is not entitled to any particular favour, not because there is any thing objectionable in his occupation, but because he deals in a hazardous business which ought to put him on inquiry and produce caution.

In the principal case, the pawnbroker, the defendant, received the goods pledged from the mortgagor's son, who was a youth, even if he had attained his majority. The articles pledged were plate and linen, marked with the name of the mortgagor: the name of the pledgor was known to the pawnbroker, and it differed from that marked upon the goods. A clerk was sent to the house of Mr. Ogden after dusk in the evening, whose name was written upon the door, on a brass plate. At the house a number of young persons were seen, but the head of the family did not pre-

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sent himself. The sums borrowed were considerable and the articles pledged were valuable. Every thing in the transaction was uncommon, and yet no inquiry was made by the pawnbroker and no questions were asked. He relied implicitly upon his faith in Mr. Ogden's son, and never inquired as to his authority, his age, his situation or condition. Was there not enough here to put a man of ordinary prudence on his guard? Would not a person of common caution have at least asked Morgan L. Ogden whether he acted in his own behalf or in behalf of another; and when by inquiry he had found that the head of the family was absent, would he not have looked further into the matter before he would have parted with his money? Nothing of the kind was done, and I consider the defendant's misfortune as the result of his own imprudence and want of caution.

If the defendant had received the articles from the mortgagor himself, then I should have been inclined to protect his rights to their fullest extent; but he received them from a young man who was not the real owner, as he *must* have known and did know, and he is not entitled to favor against a person who has in good faith advanced his money upon the same goods. The title to the goods was vested in the plaintiffs by the bill of sale, and it was perfect as against Ogden and his general creditors. The title of the plaintiffs, in short, was paramount to the rights of all persons but an innocent and *bona fide* purchaser.

There is another question as to the amount of the recovery which remains to be settled, and that relates to the extent of the plaintiffs' claim. After the goods were sold, it is evident that the proceeds might be applied to any objects to which Ludlow and Ogden gave their consent: and they might also by an agreement anticipate the sale and appropriate Ludlow's advance in the same manner. Now, it is clearly proved by the testimony of Mr. Ogden himself, that the bonds which were in fact paid, were satisfied in accordance with his wishes and the assent of Ludlow. The same remark is applicable to the debt of Brainerd and Kimberly, and neither party has any right to complain of that, to which they have expressly given their assent. The lien of Stevenson, therefore, was subject to all the equities of Ludlow's claim, and that must be settled upon

the principle of allowing him all his advances made with Ogden's assent. If Ogden consented that Ludlow should advance to the plaintiffs the amount which was actually paid by him, then that amount was covered by the mortgage. It is clearly proved that Ludlow did not exceed the sum authorized by Ogden himself, and the plaintiffs are entitled to recover, subject to an adjustment to be made upon these principles by a Judge at Chambers.

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*Judgment for the plaintiffs.*

[W. H. Harrison, Atty for the p<sup>t</sup>iffs.]

NOTE. "If the real owner suffers another to have possession of his property and of those documents which are the *indicia of property, sensible*, a sale by such a person would bind the true owner." Dyer v. Pearson, 3. B. & C. 2. 4th D. & R. 38. See also Mowry et al. v. Walsh, 8. Cowen's R. 238.

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To an action, for a total loss of freight, upon a policy of insurance, containing the usual special agreement, "that if the vessel upon a *regular survey* should be thereby declared unseaworthy, or incapable of prosecuting her voyage by reason of her being unsound or rotten, the insurers should not be bound to pay their subscription;"—the defendants pleaded, that the vessel upon her outward voyage sought a port of necessity;—"that a regular survey was held upon her there;—that upon such survey, it was thereby found and declared that certain parts of the vessel (in the survey and plea particularly specified) were rotten;—that other parts (also specified) were so defective, "that they would necessarily require to be shifted;"—that the probable cost of the repairs would amount to \$3,000 dollars,—and that, in the opinion of the surveyors, the vessel was "unworthy of repairs, and would not sell for the amount of her bills;"—whereupon they recommended that she should be sold at public auction for the benefit of all concerned.

Upon demurrer to this plea, principally upon the ground that the survey did not expressly declare the vessel to be unseaworthy or incapable of proceeding on her voyage, and that the plea sought to draw matters of fact from the jury and put the finding as to the seaworthiness or unseaworthiness of the vessel, upon the Court, by inference to be drawn from particulars stated in the survey,—the plea was held to be sufficient.

The conclusion of the surveyors, that the vessel was unworthy of repairs; that she would not sell for the amount of her bills, and their recommendation that she should be sold for the benefit of all concerned, were held to be tantamount to a *declaration* in the survey, that the vessel was unseaworthy and incapable of prosecuting her voyage, by reason of unsoundness. And such a declaration upon a regular survey, is, by the terms of the agreement, made conclusive upon the question of seaworthiness, and may be pleaded as a bar to an action upon the policy.

This cause was transferred from the Supreme Court into this Court by an arrangement between the parties. It was an action upon a policy of insurance on the freight of goods laden on board the brig Champion at and from New-York to Omoa, and from thence back to New-York.

The policy contained the usual clause against unsoundness, and stated "that if the vessel, upon a regular survey, should be declared unseaworthy by reason of her being unsound or rotten, or incapable of prosecuting her voyage, on account of her being unsound or rotten, then the assurers should not be bound to pay their subscription on that policy."

The declaration was for a total loss upon the outward voyage, alleging that the vessel departed from New-York on the 25th day of August, 1827, with the goods on board; and that while prosecuting her voyage, and before her arrival at the port of discharge, "by the perils and dangers of the seas, and by the force and violence of the winds and waves, she became leaky, and was greatly injured, broken and damaged; insomuch, that it became expedient and necessary, for the purposes of refitting and repairing said vessel to sail to and put into the nearest and most convenient port; and the said vessel did accordingly sail to the nearest and most convenient port, to wit, the port of Norfolk in the State of Virginia;" "and then and there it became and was wholly impossible to repair and refit the said vessel; by means whereof she was unable to pursue her said voyage, and the freight of the goods on board was wholly perished or lost, and became of no use or value, &c. The declaration also further alleged that the interest of the plaintiffs in the freight of the goods was abandoned to the defendants, on the sixth day of December, 1827."

The defendants pleaded the general issue, together with three special pleas in bar. The third special plea alleged, that upon the arrival of the vessel at Norfolk, "a regular survey was held upon said brig," upon which "it was found and declared" "that all the ends of the beams from the break of the quarter-deck of the said brig, to the end of the windlass, being seven in number, with the knees by which they were secured, were rotten: that the larboard wing of the transom-fashion-piece, the next timber below and all the ends of the bottom plank which butt on the transom of the said brig, were rotten, and that four top timbers from the transom to the after part of her main channels were rotten. That in the space of nine of her timbers amid-ships, five were rotten. That in the space of eight of her timbers forward of her fore-

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"channels, five were rotten. That the inner edge of the two of her bottom planks which are cut and the lower wale were rotten. That "on her starboard side on the bow, one timber and the lower wale were rotten; and that sixteen of her top timbers in the waist were rotten. That on the larboard side of said brig, four of her foothooks were rotten. That on her starboard side, seven futtocks were rotten, and that the whole of her bending streaks on both sides of the quarter, main and lower deck, the waist and wales, were so defective by rot, that they would, necessarily, require to be shifted. And the persons making the last mentioned survey, did therein and thereby estimate that the probable costs of the repairs of the hull of the said brig so declared to be rotten as aforesaid would amount to three thousand dollars, or thereabouts; and did also therein and thereby find and declare, that in their opinion, the said brig was unworthy of repairs, and that she would not sell for the amount of her bills; and they did, therefore, thereby recommend that the said brig Champion, with all her tackle, apparel and furniture be sold at public auction for the benefit of all concerned."

Upon the two first special pleas the plaintiffs joined issue, but demurred to the third. For cause of demurrer, they alleged, first, that the plea neither admits nor denies that the master and mariners of the brig were compelled by necessity *arising from sea damage*, to put into the port of Norfolk, as in the declaration alleged.

II. That the plea does not set forth, *in hac verba*, the survey mentioned and referred to, so that the Court can judge thereof in all respects, and especially if the same be regular.

III. That the plea attempts to draw the finding of matters of fact from the jury and put the seaworthiness or unseaworthiness of the vessel upon the Court by inferences from the facts: whereas such inference can properly be made only by a jury aided by the evidence of men skilled in the art of ship building.

IV. The survey and its contents are not legal evidence to prove the unseaworthiness of said brig.

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V. The plea does not aver that the said brig *was rotten* in any part, but only, that by the survey *it was found and declared that certain parts of her were rotten.*

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VI. The matters contained in the plea respect exclusively the state of the vessel *at the time of the survey* on her arrival at Norfolk, and do not relate, in any respect, to her condition *at the time of her departure* from New-York.

Mr. Sullivan.

The cause was argued by *Mr. George Sullivan* for the plaintiff, in support of the demurrer, and by *Mr. George Griffin* for the defendants.

The pleadings in this cause admit an insurance by the defendants to the extent of 3000 dollars, on the brig Champion from New-York to Omoa, and from thence back to New-York. They also admit that the vessel while prosecuting her voyage was compelled by stress of weather to put into the port of Norfolk, and that she was totally lost in consequence of the perils insured against. Thus far the plaintiffs show a clear case for a recovery. But the defendants seek to avoid the effect of these admissions, by setting forth that the vessel has been brought within that proviso of the policy, which stipulates that the defendants shall not be bound to pay their subscription, if the vessel upon a regular survey shall be declared unseaworthy.

Upon the sufficiency of this plea we have taken issue, and the special causes of demurrer point out several objections to which it is liable; but we rely principally upon the *third* cause.

The defendants in this case, plead the special matters on which they rely by way of *defeasance*, and they must, therefore, bring themselves strictly within the terms of the defeasance. The plaintiffs having agreed, that the sentence of a regular survey, if against them, should be conclusive upon their rights, the defendants are bound to show that they are clearly within the proviso of the policy on which they rely. They must produce such a survey as is contemplated by the agreement: and from its actual finding it must appear, that the vessel was *pronounced unseaworthy by reason of her being unsound or rotten*. Nothing must be left to conjecture or implication, but the

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decree which concludes the rights of the plaintiffs under the policy must be clear, direct and explicit. [*Laws on assumpsit, tit. defæ-
ance.* 8. John. R. 163. 20th J. R. 328.]

The survey by the common rules of evidence, would be no proof of the facts asserted in it ; and the defendants' plea would of course be bad, were it not for the proviso in the policy. As the defendants rely upon a special agreement, which by its strictness is to cut off the plaintiff's claims entirely, the Court will not give any latitude to the proof adduced under the agreement, not warranted by the plain terms of the survey. The proof being of a special nature, and conclusive in its effect, when against the plaintiff, is not entitled to particular favor, but must be confined within its own limits. If the survey by its express terms,—by its very sentence, has not pronounced the vessel unseaworthy, the Court will not *infer* that such was her condition from the particular facts stated. The conclusion to be drawn from the facts is not an inference of law, but amounts merely to a statement of another fact. The survey does not state that the vessel was unseaworthy, or that she could not prosecute her voyage : but sets forth certain facts from which the Court may infer, if they were at liberty to do so, that the vessel was unseaworthy.

But can the Court, on a special plea and demurrer draw any inferences from the facts ? If this were a case made, the Court would then be at liberty to make every inference from the facts found which a jury could make : but they can only take the facts as they are set forth in the survey. The plea itself, states no conclusion from the facts found, but merely alleges as a result therefrom, that by the survey, the vessel was ordered to be sold.

The question here, is not as to the sufficiency of the *survey*, but upon the sufficiency of the plea. If the survey states facts which amount to unseaworthiness, then the plea should have alleged that in explicit terms as a conclusion from the facts. The pleader seems to have supposed that it was enough for him to set forth the facts contained in the survey, and that the Court would deduce their own inferences from those facts. But it will be found that in all the cases cited from the books, the pleas expressly aver that the vessel was *unseaworthy*. Nothing is left to inference or conjecture, but

the very fact required by the proviso in the policy, to defeat the plaintiffs' right of recovery, is distinctly stated. But in this plea, no conclusion is stated, no result is set forth; but facts are detailed, from which the Court, if they are skilled in matters of ship building, *may infer*, that the vessel was unseaworthy. This is not, however, the *necessary consequence* of the facts found by the survey, and the Court will not pronounce the sentence against the plaintiffs, which it is the duty of another tribunal to declare. For these reasons the plea is insufficient and the demurrer must prevail.

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Mr. George Griffin for the defendants presented the following points.

I. The plea discloses rottenness as the sole cause of the condemnation of the vessel, within the meaning of the clause in the policy in that behalf set forth in the declaration.

II. The special causes assigned for the demurrer, do not show the plea to be bad either in substance or form. [*Brandegee v. The National Insurance Co.* 20. *John. Rep.* 328. *Dorr v. The Pacific Insurance Co.* 7. *Wheat.* 581. *Garriques v. Coxe.* 1. *Bin. Rep.* 595. *Armroyd v. The Union Insurance Co.* 2. *Binney* 394. *Griswold v. The National Insurance Co.* 3. *Cowen's. Rep.* 96. *Steinmetz v. The U. S. Insurance Co.* 2. *Serg. & Rawle.* 293.]

The counsel for the plaintiffs is mistaken in his criticism upon this special plea. The question is altogether as to the sufficiency of the survey, and not as to the sufficiency of the plea, for the plea sets out the survey as it was actually made, and nearly in its very words. The plea then is according to the truth of the case, and if the survey be insufficient in its terms, the plea must be good as a matter of course.

The language of the surveyors as set forth in the plea, is tantamount to a declaration of unseaworthiness from inherent defects in the vessel,—from rottenness. The survey expressly declares, that the condition of the vessel was such, that she "*was unworthy of repairs, and would not sell for the amount of her bills.*" It further

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recommends that the "brig Champion, with all her tackle, apparel and furniture, be sold at public auction for the benefit of all concerned." What more explicit declaration of unseaworthiness can any Court desire than this? The particular defects in the vessel are in the first place all specially stated, and then as the result of those defects, the vessel is pronounced *unworthy of repairs*. If she was unworthy of repairs, she could not be seaworthy by any possibility, and the very conclusion demanded by the plaintiff, is thus obtained. The proviso in the policy does not require that the vessel should be pronounced unseaworthy at the time of her departure upon the voyage described; but merely declares, that if the vessel on a regular survey be declared unseaworthy, then the underwriters shall not be bound to pay their subscription.

The whole question then is, whether by this *survey* the vessel is found to be unseaworthy: for if she is, the plea is a conclusive bar to the action.

The Court will, as a matter of law, put the proper construction upon the language of the survey; because if this plea be overruled, the defendants will be cut off from all the benefits of their legal bar. The survey cannot be given in evidence, to defeat the plaintiff's recovery; it must be pleaded, that the Court may say whether it is sufficient or not. The Court, then, is the proper tribunal to pronounce upon the language of the survey, and it is a question for their exclusive consideration.

In the case of *Brandegee v. The National Insurance Company*, the fifth plea of the defendants, set out the survey in the same manner in which it is set out here. No doubts were then entertained as to the correctness of this mode of pleading, because it was according to the truth of the case. Judging the plea by the rules of common sense and common interpretation, it will be found to contain every fact required by the proviso of the policy, and it must as a necessary consequence be a perfect bar to the action.

JONES C. J. This case comes before us on a demurrer to the defendants' fourth plea. The action is upon a policy of insurance which contains a special agreement, that if the vessel upon a regular survey, should be thereby declared unseaworthy, by rea-

son of her being unsound or rotten, then the assurors should not be bound to pay the subscription upon that policy.

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The declaration which is for a total loss by the perils of the sea, sets forth that the vessel was compelled, during the progress of her outward voyage, to put into the nearest port for the purpose of refitting and repairing, and that Norfolk in the state of Virginia, was the place where she sought refuge.

The defendants by their fourth plea aver that a regular survey of the tenor set forth in the plea, was held upon the brig at the port of necessity; and upon this they rely for their defence under the special agreement. To this plea the plaintiff demurs, and for cause of demurrer, exhibits six special grounds of exception. The first objection is, that the plea does not admit or deny that the vessel was compelled by necessity arising from sea-damage, to put into Norfolk to refit.

The only material ingredients of the defence under the agreement are, 1st. The fact of a regular survey. 2d. The finding or declaration of the surveyors that the brig was so rotten or unsound as to render her unseaworthy, or incapable to proceed on the voyage. Both these facts are intended to be averred by this plea in the language of the survey, and this was all that the rules of pleading could require of the pleader. The construction or legal effect of the survey, and how far it does find and declare the vessel to be unseaworthy or incapable of prosecuting her voyage by means of her being rotten or unsound, within the meaning of the clause in the policy, is a question of law, and upon which we are to adjudicate. But it is a question which goes to the competency of the survey, as a defence, and not to the sufficiency of the plea, within the forms and rules of pleading.

Seeing that the fact of a regular survey having been had upon the vessel, is distinctly averred, and that the contents of the survey and the adjudication of the surveyors are given in the plea, no valid objection can be taken to it by demurrer, unless the objection goes to the sufficiency of the matters of the survey, or the adjudication of the surveyors, to satisfy the terms of the agreement and sustain the defence. The causes which induced or compelled the master to put into the port of necessity cannot be material. Whether the defects

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or decay of the brig became so palpable and obvious as to jeopardize the safety of the cargo and crew, or the apparent cause of the leaks was the damage arising from the action of the winds and waves upon her, matters not. She was for some justifiable and sufficient cause obliged to seek a port: there she underwent a survey. It is that survey which is to determine the condition of the vessel and the cause of her distress. The first ground of demurrer is consequently untenable.

The fourth and fifth special causes must, for similar reasons, be disregarded. The survey is not offered as evidence to prove the unseaworthiness of the brig, it is pleaded as the adjudication or declaration of the surveyors, which the parties by their own compact have made conclusive on the question of seaworthiness. It has the same force and effect upon the rights of the plaintiffs, under the contract as an award of arbitrators has upon the parties to the submission, in regard to the matters embraced in the submission. If the surveyors substantiably declare the vessel to be so rotten as to be unseaworthy, or incapable of prosecuting the voyage, it will be sufficient for the insurers to produce and prove the survey to establish their defence. The objection, therefore, that the survey is not legal evidence to prove unseaworthiness, and cannot for that reason be pleaded in bar to the action, but is matter of evidence merely for the jury, which is the substance of the fourth cause of demurrer, is wholly irrelevant. And the fifth ground of demurrer, which is, that the plea, which does not aver the brig to be rotten, but avers only that the survey declares her to be rotten, so far from showing any fault in the pleading, affirms its validity: for it is to the survey that the defendant was by the contract to refer for the fact of rottenness. The parties have substituted the opinion and declaration of the surveyors for proof. And if that document pronounces the vessel unsound or rotten and condemns her as unfit from that cause for sea, the decision is decisive. No other evidence is necessary to prove the fact, and none can be received to contradict or disprove the truth of the document.

The sixth cause of demurrer objects to the plea, because it respects the state of the brig at the time of the survey, and does

not relate, in any respect, to her condition at the time of her departure from New-York. The answer is, that the plea conforms to the survey, and the objection of course, if it has any force, must be to the declaration of the surveyors, as relating to the time of the examination and survey of the vessel, instead of referring to the antecedent period of her sailing upon the voyage, for which the insurance was made. It is only necessary to state the objection in this form to show its weakness and utter irrelevancy. The agreement of the parties necessarily refers to a survey of the vessel after her departure upon her voyage; and the surveyors can only judge of the causes of her distress from the condition in which they find her upon the survey and at the time of her examination. It is not possible for them to determine or declare her condition at any antecedent period of her existence. When the survey takes place shortly after her departure, or in an early stage of her voyage, and she is then found to be in a state of decay, the probability of her unsoundness at the commencement of her voyage, approaches very nearly, if it does not actually amount to certainty. For it may be safely predicated of such a vessel, that her defects could not be of recent origin, and that no inherent cause of decay could operate so rapidly as to reduce her to such a disabled state of unsoundness in so short a period of time. But in long voyages, it is possible that a vessel not materially unsound at the time of her departure, but infected with the seeds of disease, or in any incipient state of decay, may, by constant exposure at seasons and in climates which favor and hasten the progress of the disease, become disabled and be rendered incapable of pursuing her voyage without reparation. But such a state of decay comes equally within the special provision of the policy, whether it arises upon the voyage, or existed before it began, and equally entitles the insurer to the benefits of its protection.

The best safeguard for the insurer against the mischief, was seen to consist in referring the cause of the disability exclusively to the opinion of those who are called to examine her at the time of the disaster; and when she is in her disabled condition, they alone can judge correctly of her soundness or decay, and deter-

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mine whether her inability is owing to her inherent defects, or to the injuries she received from the perils of the seas. Their judgment of her actual state and condition, if they examine with fidelity, and act impartially, cannot err ;—and as the master who is the agent of the assured, and acts for him, generally nominates the surveyors, and superintends their operations, there can be no room for any improper influence or undue practice on the part of the underwriters, and the opinion they express in the report they make, will generally be as favorable to the assured, as the truth of the fact will warrant. It is proper, therefore, that it should be held conclusive upon them ; but to make it available, it must be held conclusive, not only of the fact of unsoundness and decay at the time of the survey, but that she was incapable when she sailed, of performing the voyage, or became so afterwards by rottenness solely. And if the agreement of the parties is to have any efficacy, such a survey must bring the case within its provisions.

It would be impossible to trace the decay to its source, or to ascertain its origin, or when it first became the cause of the ship's disability. The surveyors enter into no such speculations or conjectural opinion, for such it must always be, but they confine themselves to the actual injuries or defects they discover upon the survey, and the causes, whether decay or accident and recent disaster to which those injuries or defects are to be ascribed. The agreement does not require that the survey should declare the vessel to have been unsound or rotten at the commencement of the voyage, to exempt the insurer from the payment of his subscription. It is sufficient that she be upon a regular survey thereby declared unseaworthy or incapable of prosecuting her voyage by reason, or on account of her being unsound or rotten, to protect the insurer from the loss. The surveyors are to report her actual condition as they find it ; and if her disability is found by the survey to be owing to the unsound and rotten state of her hull, and to that cause solely, the insurers, if there is any efficacy in the contract, must be discharged from the liability, however recent or remote the origin of the disease may be.

The objection, therefore, that the survey, or the plea refers to the time of the survey, and not to the commencement of the voy-

age, has no solidity. It probably was suggested by some of the early decisions on the clause in question, when its true character was not justly appreciated, and its legal construction had not yet been judicially settled. If this plea, then, be vicious, it must be because it is obnoxious to the exception taken to it by the third special cause of demurrer—upon the general ground that the survey it recites, does not sufficiently adjudge or declare the vessel to be unseaworthy or incapable of prosecuting her voyage, by reason of her being unsound or rotten, to satisfy the terms of the agreement.

The objection raised by the third cause of demurrer is two fold; *first*, that the plea attempts to draw the finding of matters of fact from the jury; and *second*, that it refers to the Court, to find the fact of seaworthiness or unseaworthiness by inference from the facts stated in the plea, which inference the jury ought to draw.

The first branch of this exception, is the repetition, in a different form of the objection, that the survey and its contents are not legal evidence of the unseaworthiness of the vessel: and the answer to it is, that the parties have by the agreement, withdrawn the finding upon the fact of seaworthiness from the jury, and substituted the survey and the declaration of the surveyors in the place of such finding, and made it conclusive upon their rights. If, therefore, it be a grievance, that the finding of that matter of fact is drawn from the jury, they owe it to their own act and voluntary compact with the insurers, and they have no right to complain. But the other branch of the exception objects further, that the plea in its present form requires the Court to find the fact of seaworthiness or unseaworthiness, by inference from the facts, or evidence stated in the plea. The plea states the substance of the survey, and reposes upon it as a conclusive bar. The point of the objection, then, must be, that the report of the surveyors details the defects and unsound condition of the vessel with the cause of them, without declaring her unseaworthy, or incapable of prosecuting her voyage, in consequence of those defects. That these details constitute the evidence from which the unseaworthiness or inability may be inferred, but which

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inference the surveyors have forbore to draw. That they were required by the terms and spirit of the agreement to declare the fact, as the result of their own judgment upon the condition of the vessel, or the report could not conclude the parties; and that when this question is left open, it is the province of the jury and not of the Court to decide it. This involves the merits of the general objection, that the survey does not satisfy the terms of the special clause in the policy; and if it was well founded, it would be fatal.

It was doubtless the intention of the parties, that the surveyors, to whom they referred the question, should exercise their judgment upon the ability of the vessel in the condition they found her, to prosecute her voyage; and how far her disability was the consequence of defect from decay, or her unsound and rotten condition, and that such judgment or opinion should be manifested by the report they should make: but they did not intend to prescribe the form which such adjudication should take, or the terms in which the opinion of the surveyors should be declared. The substance of the declaration required by the agreement is, that the vessel is found so unsound or rotten as to be incapable, from those causes, to continue her voyage. The two facts of actual disability to proceed, and decay from rottenness as the cause of it, must concur to bring her within the meaning of the provision; but the terms in which the opinions of the surveyors upon those two points are expressed, are immaterial. It is sufficient if they, in any form of expression, declare an opinion upon them so intelligibly as to satisfy the understanding of the meaning they intend to convey.

The clause in question is of modern origin. It is peculiar to us and our sister States. We are to look therefore to the decisions of our own Courts for a judicial exposition of its import. In the early discussions to which it gave rise, the leading questions seem to have been, whether the survey was a conclusive bar to the action, or only *prima facie* evidence of the unseaworthiness of the vessel which might be repelled by other proof,—and whether the survey at an intermediate port is conclusive evidence of original unsoundness or relates to the time it is made, and admits

of proof of seaworthiness at the commencement of the risk, so as to neutralize its effect upon the contract. But without entering into the history of those discussions it is sufficient to observe that those questions were settled by the Supreme Court of the United States in the case of *Dorr v. The Pacific Insurance Co.* [7 *Wheaton* 582,] where the points came distinctly before the Court and received its decision. The case arose upon a special verdict on a policy of insurance on the ship *Holofern*, which contained the clause now under consideration. The jury found that the ship was seaworthy at the time of the commencement of the risk : but that in the course of the voyage she met with violent gales, in consequence of which she sprung a leak and was compelled to bear away for New Providence, where, upon a survey held upon her, she was found to be in a leaky state, and the surveyors, having caused a part of her ceiling to be stripped off, discovered her to be in a very decayed condition ; and they certified that they were of opinion that she was altogether unworthy of being repaired, and ought to be condemned as being unsafe and unfit ever to go to sea again. She was condemned accordingly and sold.

It was contended that the survey was not conclusive evidence of the unsoundness of the vessel at the time of her sailing upon the voyage, but left that point open to further inquiry ; and that the special verdict had negatived the presumption of unsoundness arising from the survey, and neutralized its effect as a bar. But the Court held that the words of the contract expressly look forward to a future event, and contemplate two objects ;—first, that a state of rottenness ascertained at any stage of the voyage should be conclusive evidence of original unsoundness : and secondly, that the determination of that fact by means of a regular survey should be received as conclusive evidence between the parties. It was further objected to the survey in that case, that it certifies the existence of other causes of loss besides the decayed state of the vessel ; and it was admitted by the Court that if the vessel be declared unseaworthy for any additional cause besides her being unsound and rotten, the survey would not avail the defendant as a bar. But they held that in the case before them, decay was

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exhibited as the mortal disease, and every thing else was either inducement or consequence. That the springing a leak was the consequence of that state of decay which weakened her whole fabric, and her being unworthy of repairs or unfit to go to sea, was no additional cause of condemnation, but the mode in which the disease produced her destruction. The views of the Court upon the latter point, show the case then before them in that aspect of it, to bear a strong resemblance to this, and we may deduce from the reasoning applied to that cause, principles peculiarly applicable to this. The conclusion drawn by the surveyors from the decayed state of that vessel was, that she was unworthy of being repaired, and as a consequence of that opinion they advised her condemnation, as unsafe and unfit ever to go to sea again. Their own sentence, however, was, that she was unworthy of being repaired. The same sentence, in nearly the same words, is contained in the survey now under our consideration.

Two cases have recently occurred, in which the opinion of our Supreme Court has been expressed upon the construction and legal effect of the clause in question, and the requisites of the survey to which it refers. [*Brandegee v. The Nat. Ins. Co.* 20 John. R. 328.—*Griswold v. The Nat. Ins. Co.* 3 Cowen's R. 96.]

The opinion of the Supreme Court, in the cases to which I have just adverted, as I understand its decisions, is in accordance with that expressed by the Supreme Court of the United States. In those cases, the defence was taken by plea, and the form of pleading the survey, was calculated and intended to test its legal effect: for it was set up and relied upon by the pleader as a decisive bar to the plaintiff's action. And the plaintiff's counsel for that cause demurred, insisting that the clause in the policy to which the plea referred, did not make the survey conclusive evidence of the fact of the vessel being rotten, and if it was not conclusive, but *prima facie* evidence merely, it could not be pleaded in bar. In the case of *Brandegee v. The National Insurance Co.*, where a plea in that form was first interposed, the ground was distinctly taken by the defendant's coun-

sel, that the survey was conclusive, and by the plaintiff's, that it was *prima facie* evidence merely : and upon that point the question turned, whether it was of itself a defence and could be pleaded in bar, or was matter of evidence only, and must be given in evidence. It was admitted in that case, that the survey, to be available as a bar to the action, must be regular, and must declare the inability of the vessel to further prosecute her voyage to be, because she is unsound or rotten, and for that cause solely. But it was contended that if the survey amounts to a declaration by the surveyors that the ship was unseaworthy by reason of her being unsound or rotten, or that she was incapable of pursuing her voyage from that cause, it is decisive upon the right of the parties. No particular form of expression is required, nor is it essential for the surveyors formally to adjudge or declare her to be unseaworthy or incapable of prosecuting her voyage by reason of rottenness : it is sufficient that they substantially pronounce her disability, and show the cause of it to be defects by rot, and not injuries from disaster. The language in which the declaration is made, and mode of expressing the opinions they give, are not material.

Let the efficacy of the survey under consideration be tested by these rules. The surveyors specify numerous defects, discovered by them in their survey, all which they ascribe solely to rot, and they superadd the declaration that the whole of her bending streaks on both sides of the quarter, main and lower decks, the waist and wales were so defective by rot, that they would necessarily require to be shifted ; and they estimate that the probable cost of the repairs of the hull of the brig, so declared to be rotten, would amount to \$3000, or thereabouts ; and declare their opinion to be, that she was unworthy of repairs and would not sell for the amount of her bills, and they recommended that she should be sold. How could language more clearly and forcibly express the disabled condition of the vessel, or the cause of her distress ? She is described as being so rotten, that the probable expense of the repairs of her hull so declared to be rotten would be about \$3000 ; and an opinion is expressed that she was unworthy of repairs, and ought to be sold. Where is the escape from the con-

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clusion that she was unseaworthy, and wholly incapable of proceeding on her voyage, and that rottenness was the sole cause of her disability?

It is said the surveyors have not expressly declared her unseaworthy or incapable of proceeding on her voyage. They have not used those precise terms, but the expressions they have employed are tantamount to that declaration. A vessel whose hull is so rotten that she is unworthy of repair, cannot be seaworthy, nor capable in her crippled and disabled condition of proceeding on her voyage; and when the surveyors after examining her, instead of advising the repair, recommend a sale of her, they emphatically pronounce her unfit to proceed on her voyage, and in ascribing her inability to rottenness solely, they bring her fully within the provision of the clause in question.

It was said, that if the cause of the condemnation be the great expense of repairs as well as the unsound state of the ship, the survey for the same reason will not be a bar. But the mixed causes of condemnation must be disclosed by the survey itself, and cannot be shown by extrinsic evidence. The survey is its own test of the ground of the declaration it contains. If it appears that unsoundness proceeding from decay was the sole cause of inability, the survey is a bar, otherwise not. Tiglman J. held, in the case of *Garagues v. Cox*, that if the survey upon the vessel should say that she was unsound, and for that cause was condemned and should say no more, the plaintiff would be barred. It is usual, however, to state the particular parts which are found to be rotten or decayed, and it is always advisable to do so, because it is more satisfactory to exhibit on the face of the record the reason for the conclusion of the surveyors. And for that reason the same enlightened Judge in the subsequent case of *Steinmetz v. The U. S. Ins. Co.* [2 S. and R. 297,] observes that "it would not be proper to say in general terms that the vessel was rotten, but that the defects ought to be stated." But whether the surveyors content themselves with the general statement of rottenness as they may do, or use the more correct form of specifying the particulars of the decay, it is perfectly clear from all the cases, that if they ascribe the inability of the ship to her unsound and rotten condition

solely, or if they specify her defects and attribute each to decay, and then pronounce her irreparable or unworthy of repair, or unfit to proceed on her voyage, without stating any other reason for their opinion, the survey will be conclusive upon the right of the parties; and the plaintiff will not be at liberty to repel it, by proof of the soundness or sufficiency of the ship for the voyage, or, by showing that she in truth became innavigable or unworthy of repair from other causes; for it is well settled that the effect of the agreement in the policy is to render the survey conclusive upon the parties.

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When, therefore, the surveyors in the case at bar, enumerate the long list of defects in the hull of the brig specified in the survey, and attribute all of them to rottenness and decay, and give the probable estimate of the cost of the repairs of the hull so declared to be rotten, at a sum equal to the whole value of the brig as estimated, without mentioning or suggesting any other reason for the expense of her reparation than the extensive repairs required by her unsound condition; and when they follow up this description of defect, and estimate of the expense of repairs, with the opinion that the brig is unworthy of repair, and recommend the sale of her; we are not at liberty to refer the opinion or recommendation of the surveyors to any other cause than the rottenness of the vessel to which the report is confined; nor can we suppose or intend the estimate of the cost of the requisite repairs, to proceed upon any unusual or peculiar difficulty or expense incident to the reparation of vessels in that particular port, the survey taking no notice of any such special circumstance, but placing the estimate upon the general ground of an ordinary repair of the decayed and rotten hull of the brig.

Nor indeed could it avail the plaintiff to show the fact, supposing it to exist, that the difficulty of repairs at Norfolk, the port of necessity, and the great expense attending them, were amongst the reasons why the brig was unworthy of repair, and would not when repaired, sell for the amount of her bills. For conceding such to be the actual state of the case, still the sole cause of her being irreparable or unworthy of repair was the unsound and rotten condition of her hull, and not the disaster which she had

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encountered on her voyage. She was at Norfolk and in want of repair of to enable her to proceed on her voyage. These repairs must be done to her whatever the cost may be, or she cannot go on. And if rottenness was the cause which induced the necessity of that repair, the vessel was literally unable to prosecute her voyage by reason of her rottenness. It may, perhaps, be at the option of the assured, in such cases, to incur the expense of the repairs, if the vessel was in fact reparable, and proceed with her on her voyage, or to break up the voyage and abandon the vessel as not worth repairing. But the capability of the vessel of repair is not in such cases the criterion; for a vessel unseaworthy from decay, may, nevertheless, be reparable. The expense of her repair will vary with the extent of her defects, and the facilities or difficulty of obtaining workmen and materials at the port of necessity. The true test is her inability to proceed by reason of her defects. And if she is in that condition, so that the voyage be rightfully broken up for that cause, and the survey upon her so declare the facts to be, the *causa faderis* has occurred, and the underwriter is absolved from his obligation to pay his subscription.

If, then, it be conceded that the survey now before us, either expressly or by necessary implication admits the vessel to be reparable, and declares her unworthy of repair by reason of her unsoundness or decay, and from the difficulty and expense of procuring workmen and materials for her repairs at the port of Norfolk, still, as her repairs were indispensable, to enable her to proceed on her voyage, and the rottenness of her hull is the sole cause to which the necessity for them is ascribed by the survey, she was in her actual condition unseaworthy, and incapable of prosecuting her voyage by reason of rottenness; and the Insurers cannot be chargeable with the loss which ensued from the abandonment and sale of her.

It was strenuously urged that the plea admits the facts set forth in the declaration, and consequently admits that the disability of the brig to pursue her voyage was partly owing to recent injuries by the perils of the sea. But it is not true that the plea admits the causes of loss to be such as the plaintiff in his declaration alleges them to be. It admits the fact that the vessel did put into

the port of necessity for the purpose of refitting and repairing, and that it was wholly impossible to repair and refit her, as averred in the declaration, but it refers to the survey as conclusive proof of the causes of her disability, and as a bar to the plaintiff's recovery. And the utmost extent of the implied admission of the causes which induced or compelled her to put into port for repairs, is, that the apparent causes of that necessity were those which the declaration states ; but that implied admission is to be taken with this qualification, that the pleader refers to the survey as unfolding the true state of the facts and showing the real cause of the disaster. The plea has reference to the declaration, and admits the substantial facts which it would be incumbent on the plaintiff to prove, to entitle him in the first instance to recover, and then sets up the survey under the special agreement in the policy as a bar to that recovery ; but no allegation or averment is admitted which is repugnant to the bar created by the survey. The plaintiff cannot control or evade the force and effect which his own agreement gives to the survey, by his averments in his declaration, any more than he can by evidence at the trial. When therefore the survey declares the vessel unseaworthy or incapable of proceeding by reason of rottenness, the plaintiff is precluded by his own contract from ascribing her inability to any other cause ; and a plea which sets up the survey as a bar, will not be an admission of any averment in the declaration, of any cause of disability, inconsistent with the report of the surveyors.

If the case be stated from the allegations of the plaintiff, which the plea admits, and the additional facts appearing in the survey which the plea sets up and asserts, it will stand thus.—The brig having, by means apparently, (and, as was supposed at the time) of the perils and dangers of the seas, and the force and violence of the winds and waves, become leaky and greatly injured, broken, and damaged, it became, and was expedient, and necessary, to put into the nearest and most convenient port for the purpose of refitting and repairing her ; and she did accordingly, from that necessity, put into the port of Norfolk, which was the nearest and most convenient port for that purpose ; but that it became and was wholly impossible to repair and refit the said brig, be-

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cause, upon her arrival at the port of Norfolk, and in reference to the voyage, and the state and condition of the brig at the time of the said arrival there, a regular survey was held upon her at Norfolk; and upon such survey, it was thereby found and declared, that the numerous defects from rot, specified in the survey, and the extreme decay from the rottenness of her hull, and those causes solely, rendered her unworthy of repairs.

Who can read this statement, which is faithfully abstracted from the pleadings, without the full impression upon his mind, of the opinion and declaration of the surveyors, that the brig was in effect unseaworthy, and incapable of continuing her voyage, in consequence of the defects in her hull, proceeding from rot? I acknowledge that my understanding is so thoroughly convinced of the import of the declaration, that I am unable to attach any other sense to the expressions they have employed. And it seems to be impossible to come to any other conclusion, from the facts they state. To understand the full force of the report, we must view it in connexion with the disabled state of the brig to which it refers, and the causes of the survey upon her. She was not at her port of departure, undergoing a survey to satisfy the insurers of her ability to perform the voyage on which she was about to sail. She was in a port of necessity, to which her disabled condition and avowed inability to proceed on her voyage, had compelled her to come, for the purpose of repairing and refitting, so as to enable her to resume and complete her voyage. It was to ascertain the extent and the causes of her disease, and the practicability and expediency of repairs, that the survey was held upon her.

Let it not be objected that the survey is to explain itself, and can derive no aid from extrinsic facts. We do not go out of the record for the facts which we connect with the report: they appear upon the face of the pleadings. The plaintiff in his declaration, in effect avers them, and the plea admits them. The survey has an immediate and necessary connection with them, and refers to them. The first and most material fact thus taken from the history of the brig, as it appears upon the record, is the actual inability of the vessel at her arrival at Norfolk, and

when the survey was held upon her to prosecute her voyage in her then present state and condition. This fact is distinctly averred by the plaintiff, and its existence is the only cause that could justify the deviation from the track of the voyage to put into an intermediate port, not permitted by the policy. And the surveyors act upon that assumption in making the survey, and must be understood as speaking in reference to it, when they express the opinion in the report, and recommend the sale of the vessel, and consequent termination of the voyage. The survey was called and held upon her as a vessel already reduced to an incapacity to pursue her voyage ; and the chief purpose of the survey was to investigate and report the cause of her inability, and to recommend and prescribe the course to be pursued by the master.

When, therefore, they discovered the extensive defects of her hull from rot, and came to the conclusion, that the expense of the repairs which that rottenness rendered necessary, would exceed her value when repaired ; and when they declared their opinion to be, that she was not worthy of repair, and therefore recommend the sale of her, did they not in effect declare her to be unseaworthy, and incapable of proceeding on her voyage, from the rottenness of her hull ? When they reported a vessel which was in a disabled condition, and from inability to proceed on the voyage had put into port for repairs, to be unworthy of repairs, was not the report tantamount to a declaration that she was unseaworthy ? Did not the declaration that she was unworthy of repairs, necessarily assume and include the fact, that she stood in need of repairs to make her seaworthy, or to enable her to prosecute her voyage ? And when they recommend the sale of her because she was unworthy of repair, did they not virtually declare her incapable of her proceeding on her voyage in the state she then was, without first undergoing reparation ?

If either of these propositions is well founded, the survey amounts to a declaration that the brig was unseaworthy, or incapable of proceeding on the voyage, and it must be conceded that the rottenness of her hull is the sole cause to which the survey ascribes her disability.

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I am satisfied, therefore, that the exceptions taken to the plea, in this case, are not well founded; and there must be judgment for the defendants on the demurrer.

Judgment for the defendants on the demurrer.

[A. S. Rogers, *Att'y for the plf's.* G. W. Strong, *Att'y for the def'ts.*]

THE NEW-YORK GAS LIGHT COMPANY

versus

THE MECHANICS FIRE INSURANCE CO. OF THE CITY OF NEW-YORK.

The defendants, by a policy bearing date the 12th of May, 1826, insured the plaintiffs to the amount of \$5000, for seven years, on "fixtures," placed or to be placed in buildings of their subscribers. By another policy dated the 2d of December, 1825, the defendants had insured the plaintiffs to the amount of \$2000 on "gas-meters placed or to be placed in the city of New-York for three years." At the date of the first policy, the plaintiffs had placed gas-meters to the amount of \$2000;—but at its *expiration*, their mount had been increased to \$20,000. When the policy on the "fixtures" was made, their value was estimated at \$5000;—but this amount was afterwards increased to to \$100,000 and upwards.

The gas-meters and fixtures were subsequently injured by fire to the amount of \$2500, a part of which was upon the "gas-meters and fixtures" placed at the date of the policies, and a part upon those which were established afterwards. HELD that by the true construction of the policies, they covered all "fixtures" to the amount of \$3000, whether erected before or after the date of the policies.

HELD also that parol evidence was inadmissible to prove a verbal representation made by an agent, at the time the policies were effected, as to the value of the fixtures intended to be placed by the plaintiffs.

THIS action was brought to recover the amount of damage sustained by the plaintiffs from the destruction or injury by fire, of certain "gas meters" and "fixtures" belonging to them, which had been insured by the defendants in two separate policies.

The first policy was dated the 12th of May, 1826, and by it, the defendants insured the plaintiffs "five thousand dollars," viz :

on "fixtures, belonging to and rented by the Company, placed or June Term,
 "to be placed in the buildings, stores or dwellings of subscribers, 1829.
 "for seven years." In case of loss or damage, the injury
 to be estimated according "to the true and actual value of
 "the property at the time the same should happen." New-York
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By the second policy (which bore date the 2d of Dec. 1825,) the defendants insured the plaintiffs to the amount of two thousand dollars, "on gas-meters placed," or thereafter to be placed in "various buildings in the city of New York," from the date of the policy to the second of December, 1828." The company however, were not bound to pay when loss or damage should occur from "fire occasioned by gas."

The loss claimed by the plaintiffs was for damage from fire, *not occasioned by gas*, to *gas-meters* belonging to the plaintiffs, placed in various buildings by consumers of gas, and to *fixtures* belonging to and rented by the plaintiffs, placed in buildings, stores and dwellings of subscribers,—all of which were situated in the City of New-York. At the trial it appeared that the plaintiff commenced the business of supplying gas shortly before the first policy was effected. At the time of its date, the value of the *gas-meters* "placed" was about \$2000, but when the policy expired, it had been increased, by additional *gas-meters*, to the sum of \$20,000 and upwards.

When the policy on the "fixtures" was effected, the value of the fixtures, belonging to the plaintiffs, in buildings, stores and dwellings of their subscribers was upwards of \$5000, which amount was subsequently increased, by additional fixtures to upwards of \$100,000.

It was admitted that a part of the damages claimed by the plaintiffs, was for injuries by fire, not occasioned by gas, to the *gas meters* and *fixtures* placed by the plaintiffs at the time the respective policies were effected; and the residue of the injury was to *gas-meters* and *fixtures* *subsequently placed*,—the whole amount of which, for the purposes of this case, was admitted to be \$2500.

The defendants' counsel offered to prove that at the time the policies were effected, it was *verbally* represented by the agent of the plaintiffs, that the value of the *meters* and *fixtures* intended

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to be placed by the plaintiffs would not exceed \$5000, but admitted that such representations were made in good faith, and disclaimed all idea of offering the evidence for the purpose of showing any actual fraud in the transaction. This evidence was overruled by the presiding Judge. Upon this statement of facts it was agreed that a verdict should be taken for the plaintiffs for the nominal sum of \$2500, subject to the opinion of the Court, on a case to be made and subject to an adjustment of the amount which the plaintiffs were entitled to recover, to be ascertained according to the principles which the Court should adopt. Either party had leave to turn the case into a bill of exceptions, and it was stipulated, that the Court might, in their discretion, direct a non-suit, or a new trial.

The cause was now argued by *Mr. Slosson* for the plaintiffs, and by *Mr. Jay* and *Mr. D. B. Ogden* for the defendants.

Mr. Slosson observed that there were two points to be considered. The first related to the construction of the contract, and the second, to the admissibility of the parol evidence. The first question was, whether the gas-meters placed *after* the date of the policy were insured at all. Upon that point, the words of the policy (*he said*) were plain and explicit. The very subjects of insurance were gas-meters and fixtures placed, or *to be* placed, and it matters not whether they were established before the date of the policy or afterwards. The plaintiffs wished to insure a certain sum for a length of time on their property, and as it was of a changing and shifting kind, the defendants used words broad enough to cover the intention of the parties.

II. Parol evidence to explain a contract so explicit, was clearly inadmissible. The policies speak their own language and the defendants cannot make them speak another by the mouths of witnesses. [*Phil. on In.* 117, 118. *Thompson v. Ketcham* 8. *J. R.* 189.]

Mr. Jay and Mr. Ogden contended that the policies were satisfied when gas-meters to the amount of \$3000, and fixtures to

the amount of \$2000 were erected. That the risk attached to the subjects of insurance *then* established and not to any thing erected afterwards. Suppose fixtures and gas-meters to the amount of \$100,000, to be erected subsequently to the date of the policy and then a loss,—what sum must the defendants pay? Not the whole \$5000, but such a proportion of that sum, as the fixtures and gas-meters actually insured bear to the \$100,000. The construction contended for on the other side, is against the grammatical meaning of the words of the policy, and would lead to absurd conclusions. It ought not therefore to be adopted.

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II. As to the parol proof, it ought to have been admitted, because its object was to show an incorrect representation; and a false representation whether fraudulent or not, avoids the policy.

*Per curiam.* We think that by the true constitution of these policies, they were intended to cover and did cover all the "fixtures" mentioned therein, to the amount of \$2000; and this, whether they were "placed" before or after the date of the policy. There is an exception it is true, as to losses occasioned by fire, proceeding from gas; but that does not apply to the case now before the Court.

As to the parol proof offered by the defendants, it was clearly inadmissible. The contract is to be construed by its own terms plainly expressed in the policies, and it cannot be varied by the proof rejected at the trial.

*Judgment for the plaintiffs.*

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JONATHAN OGDEN AND OTHERS

versus

JAMES DOBBIN AND JOSEPH EVANS.

The holder of a promissory note, who receives and indorses it for the sake of collection only, although a mere agent, is to be considered as the real holder, for the purpose of receiving and transmitting notices.

When a note has been presented for payment and payment is refused, the holder acts with reasonable diligence, if he gives notice by the regular course of mail, to the indorser from whom he received it, that he may transmit notice to his immediate indorser, who may take the same course as the prior indorsers. And if the indorsers, in due season, adopt the regular course of the mail, for transmitting notices from one to the other, and by that means the route to the first indorser is made circuitous, it is no want of diligence on their part; and he cannot set up the manner of the giving of the notice and the delay occasioned by it, as a defence.

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When a note is made payable at a particular place, it must be presented at that place for payment. But when it is made payable at a *Bank*, and the note is placed in the hands of the cashier of that Bank for collection, there is no necessity for his making a specific or clamorous demand. The legal requirements, as to presentment and demand are complied with, if the note was in the bank at the time it fell due, in the hands of the cashier, who was ready to receive the money.

THIS was an action upon a promissory note for \$856 81, made by the mercantile firm of Goddard & Burnap, of Eatonton, in the State of Georgia, in favor of the defendants, and payable to their order, at the *Branch of the State Bank of Georgia, at Eatonton*, six months after its date, and indorsed by the defendants.

The declaration contained three counts. The first stated that the plaintiffs were the first indorsers of the note;—the second set forth an indorsement by the defendants to one E. Molyneux, Jr., and by him to the plaintiffs. Both counts averred a presentment of the note at the Branch of the State Bank of Georgia, at Eatonton, for payment, on the 17th day of March, 1828, and a neglect

and refusal to pay. The third count was for money had and received.

The cause was tried before Mr. Justice OAKLEY. At the trial it appeared that the note had been indorsed by Molyneux to the firm of Stiles & Fannier, of Savannah, and by them to one D. B. Halstead, of Milledgeville, who had also put his name upon it:—but these two last indorsements were stricken out. It also appeared that Stiles & Fannier had forwarded the note to Halstead for collection, and that he immediately transmitted it to the cashier of said Branch Bank at Eatonton.

On the 17th of March, 1828, (the day when the note became due,) the cashier handed it to a notary, who presented it to Burnap, one of the makers, at their place of business in Eatonton, and demanded payment, which was refused. The note was thereupon immediately protested for non-payment, and a notice thereof, addressed to the defendants, was on the same day put into the mail at Eatonton. But as the notary *did not know where the defendants resided*, he enclosed the notice in an envelope directed to Halstead, at Milledgeville, from whom the cashier received the note for collection.

Milledgeville is twenty-two miles distant from Eatonton ; but the arrangement of the mails between the two places is such, that the notice did not leave Eatonton nor reach Milledgeville until the 23d of March, 1828. Halstead on that day received the notice, directed it to the defendants at New-York, and immediately put it into the mail ; and thus directed, it left Milledgeville for New-York, on the 24th of March.

It appeared by the evidence, that if the notice had been transmitted by the notary, direct from Eatonton to New-York, it would have left the former place on the 18th of March, and by due course of mail, would have reached New-York in eleven days thereafter. The mail is also occupied eleven days in passing from Milledgeville to New-York. If the notice, therefore, had taken the most direct course to New-York, it would have reached that city on the 28th of March, whereas by the route adopted, it could not arrive there until the third of April, 1828.

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It appeared also, that the notary had addressed notices of the non-payment of the note to Stiles & Fannier, and to Molyneux, the other indorsers, and that these notices, in like manner, were enclosed to Halstead at Milledgeville.

There was no evidence of any specific demand of payment of the note at the Branch Bank in Eatonton ; but it was proved that Goddard & Burnap never had any funds in that bank, with which to pay the note.

Upon this evidence, the counsel for the defendants contended that the plaintiffs had no right to recover ; first, because the plaintiffs had not used due diligence, nor adopted a proper course in giving notice to the defendants of the non-payment of the note : and secondly, because there was no proof to show that the note had been presented at the bank for payment. The presiding Judge, however, charged the jury that the plaintiffs had a right to recover, and the jury returned a verdict in their favor.

The defendants excepted to the opinion of the judge ; and by consent of parties, a case was made for the opinion of the Court, which either party had leave to turn into a bill of exceptions.

*Mr. J. Greenwood*, for the defendants, now contended,

I. That the plaintiffs did not use due diligence in the *manner or time* of giving notice to the defendants of the non-payment of the note. If Halstead was the agent of the plaintiffs to collect the money, he was bound to use all diligence for his principals. He ought to have informed the cashier of the Bank, when he transmitted the note to him, of the residence of the indorsers. The plaintiffs, however, are bound by the acts of their agent, and they have no right to transmit their note through a circuitous line of agents for collection, to the prejudice of other parties. The holder can claim no right of delay by employing agents, but must act with the same promptitude which the law requires in all cases where an indorser is to be charged. [2. John. Cas. p. 1. 3 Bos. & Pul. 599. 18 John. R. 230.]

II. The note ought to have been presented at the Bank in Easton for payment. The general rule is, that a note must be presented for payment at the place where it is made payable, and want of funds will not dispense with a neglect of demand. [17. *John. R.* 248. 19 *J. R.* 420, 1. 16 *East.* 113.]

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III. The plaintiffs having averred that the note was presented at the Bank, must show the fact to be so, and cannot cover the defect in their proof, by resorting to the count of money had and received.

*Mr. Thomas L. Ogden, contra, for the plaintiffs.*

As to the first point made by the defendants, it will not be contended that any greater diligence is required of an agent than of a principal. In point of fact, Halstead had no interest in the note, but was a mere agent for Stiles & Fannier, who had sent it to him for collection. But suppose he was the real holder of the note, having received it of Stiles & Fannier by a *bona fide* indorsement,—what would have been the cashier's duty in that case, he being the agent of Halstead? Clearly he would have been justified by giving immediate notice to his principal, that he might notify his immediate indorser. The rule is well settled that the notice may pass circuitously from one indorser to another in the regular order of the indorsements, until it shall reach the person who first negotiated the note, by putting his name upon it to give it currency. Any other rule might work the most manifest injustice, for in many instances it is impracticable for the last indorser to state the places where the first and intermediate indorsers reside. Notes are transmitted from agent to agent for the mere convenience of collection, and are indorsed by such agents for that purpose merely. By what channel shall the notice return, except by that in which the note, and with it the names of the various indorsers, came? The last indorsee may know no person whose name is on the note except his immediate indorser, and if he uses all diligence to transmit the notice direct to the person from whom he received the note, (the residence of the others being unknown,) he discharges his duty.

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In this case, it is in evidence, that the notary who made the demand and protest, was ignorant of the residence of the defendants. But it is said that Halstead should have informed the cashier as to that, when he transmitted the note to him for collection. Halstead himself was but an agent for Stiles & Fannier ; and what proof is there that *he* knew where the defendants were to be found ? The same remark is applicable to Stiles & Fannier, for it is to be presumed that they were agents merely, since we find their names stricken from the notes.

But this matter is fixed and settled by the authority of cases decided in our own Courts, as well as those of other states and countries, and there can be no doubt that the notice was properly given, and that it is sufficient to charge the indorsers. [3 John. Cas. 89. 18 John. R. 230. 5 Mass. R. 167. 3 B. & P. 599. 5 Cowen's R. 303.] This last case is quite decisive upon this point.

II. As to the demand. It is in evidence that the note was at the bank on the day that it fell due, and if the makers had placed funds there, or presented themselves with funds, the money would have been received and the note given up. The cashier, who was the agent of the holders, knowing that there were no funds in the bank for the payment of the note, did not perhaps clamorously demand the money, but he was ready to receive it, had the makers been prepared to make payment. It was sufficient that the note was at the bank, and the averments in the declaration are fully satisfied by this state of the proof. [6 Mass. R. 524. 2 Hen. Bla. 510. 18 John. R. 230.]

*Mr. Greenwood* and *Mr. Anthon*, in reply.

This case is not like any of those to be found in the books ; it is *sui generis*, and cannot be supported on any sound principle. The leading authority for all subsequent decisions upon this subject was the case of *Haines v. Burkes*. [3 B. & Pul. 599.] It is the foundation upon which the others rest, and no principle can be found to uphold the sufficiency of this notice.

The indorser of a note is entitled to notice of its non-payment, from the last *real holder*. The latter has no right to establish a circuitous line of agents, through which the notice is to be passed before it can reach the principal: and if the plaintiffs transmitted the note to Stiles & Fannier for collection, they were bound to inform them where the defendants' place of residence was. The same information should have been given to Halstead, that he might have communicated it to the cashier, and the latter would then have been bound to transmit his notice directly to New-York. The object of the notice is, to give the indorser an opportunity to secure himself;—but here six days were lost by the *laches* of the plaintiffs and their agents. If the principle be once established, that the holder of a note may transmit it from agent to agent for collection, and that notice of non-payment may return through the same channel, there is no bound at which we can stop. A note payable at Eatonton, may pass from New-York through a dozen different States, stopping with an agent in each, and notice of non-payment may then travel the same leisure road on its return. This cannot be permitted, and the cases cited do not support the plaintiffs' position. The authorities from the first of Johnson's Cases and that from the third of *Bosanquet & Puller*, are not in point for the plaintiffs, and are cited by us, to show the distinction between the *true rule* and the one sought to be established. There was no line of agents in those cases, and the same delay was not produced. So in the case cited from the 18th of *Johnson's Reports*. There the notice went by an immediate and customary route of the mail, although not by the shortest route, and the party was in the habit of receiving his letters by the course adopted.

But the case on which the defendant seems principally to rely, is that from the 5th of *Cowen*. In that case a draft on Bristol (R. I.) was put into the Mechanic's Bank of New-York, for collection, transmitted to Providence and from thence to Bristol. This was the regular course of the mail, and the *only* route by which it passed. The notice was *immediately* returned by the same route, and there was none other by which it *could* be transmitted. There was no delay in that case, no travelling from the ordinary course. How is it here? Eatonton is but 22 miles from Milledgeville, and yet

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the notice was seven days in passing between these two places. Was that diligence? The notary should have inquired after the residence of the indorsers, and in the want of other information, the place of the date of the note would have been a guide. But here, the notary is supposed to have discharged his duty by the most negligent *attempt* at performing it. The notice cannot be deemed sufficient, and the defendants are discharged by the *laches* of the holders themselves.

II. The plaintiffs having averred a presentment at the bank for payment, and a demand there, should have proved the facts laid in their declaration. Such proof was a condition precedent to their recovery, and the want of funds is no answer to the want of demand. In this respect there is a difference between the case of a promissory note and a bill of exchange, and the plaintiffs have neglected their duty. The makers have promised to pay the note at the bank at Eatonton, and there is nothing to show that it would not have been paid at the time and place, had a demand been made. But at all events the plaintiffs were bound to prove all the material allegations in their declaration, and in relation to the demand of payment they have totally failed.

OAKLEY J. This was an action on a note drawn by Goddard & Burnap, and payable to the defendants. It bore date at New-York, where the defendants resided, and was made payable at the State Bank of Georgia at Eatonton. It was indorsed by the defendants, and under their name, by *E. Molyneux*; and it had been indorsed under the name of Molyneux, by *Stiles & Fannier*, and by *D. B. Halstead*. The two last indorsements were stricken out.

The note was sent by *Stiles & Fannier*, who resided at Savannah, to Halstead at Milledgeville, for collection, who indorsed it, and sent it to the cashier of the Bank at Eatonton, where it was payable. The evidence sufficiently shews that the note remained in the Bank until it fell due, when it was handed by the cashier (there being no funds there to pay it) to a notary, who made a personal demand of payment on the maker, who resided at Eatonton. The notary, not knowing the residence of the defendants,

or of any of the indorsers, before *Halstead*, made out notices of demand and of non-payment, directed to them severally, and enclosed them in a letter to *Halstead*, which was deposited in the post office at Eatonton without delay. By the order of the mail, that letter did not leave Eatonton for Milledgeville until five or six days had elapsed. Immediately on the receipt of the notice to the defendants by *Halstead*, he directed it to them at New-York; and it was despatched from Milledgeville, without delay; but by the arrangements of the mails it could not have reached New-York, by several days, as soon as it would have done if it had been sent directly from Eatonton.

On this state of facts, the defendants object, 1st, that the note was not duly presented for payment at the Bank, and 2dly, that there was a want of due diligence in giving notice to the defendants of non-payment.

As to the first objection, it is clear, that a note payable at a particular place, must be presented for payment at that place; but it cannot be doubted that the facts in this case show such a presentation. The note was in the bank at the time it fell due, and in the hands of the cashier, who was authorized to collect it. If the makers had called there to pay it, it would have been delivered up to them. There was no necessity for the cashier to make any other demand. His subsequent delivery of the note to a notary, and his personal demand on the makers, was probably by way of greater caution, and was clearly unnecessary. [2 *H. B.* 509. 6 *Mass.* 524.]

I am of opinion, also, that there was no want of diligence in giving notice to the defendants. The objection rests on the ground that *Halstead*, knowing the residence of the defendants, ought to have informed the cashier of the bank; and in that case, notice would have been received by the defendant several days sooner than it was.

The rule governing this part of the case seems to be clearly laid down in *Mead v. Engs*, (5 *Cow.* 303.) The Supreme Court there fully establish the principle that the holder of a note, receiving and indorsing it for the purpose of collection, and being therefore merely an agent, is nevertheless to be considered as the real holder for the

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purpose of receiving and transmitting notices. And the general rule seems clearly settled, that it is sufficient to give notice of non-payment with reasonable diligence, to the indorser, from whom the note was received, that he may give notice to his immediate indorser, &c.

Applying that principle to the present case, it was enough for the cashier of the bank, or the notary, to give notice by the earliest opportunity in the regular course of the mail, to *Halstead*, which was done; and it would have been sufficient for him, to have given the like notice to his immediate indorsers at Savannah. It is clear that the defendants in this case received the notice as soon, or sooner, than they would have done if it had been remitted in that circuitous manner. The same doctrine is also recognized in *Tunno v. Lague*, (2 J. Ca. 1.) and in *Haynes v. Birks*. (3 Bos. & Pul. 599.) The motion for a new trial must be denied.

*Motion for new trial denied.*

[Ogden & Huggins, attys. for plffs. J. Greenwood, atty. for deft.]

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ALEXANDER BIRKBECK,

versus

FANNING C. TUCKER, ROBERT CARTER, RICHARD S. WILLIAMS,  
HENRY PACKARD, JOHN H. HOWLAND AND RICHARD MORELL.

Birkbeck  
v.  
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others.

A mortgagee of a vessel, out of possession at the time supplies for her are furnished, but who takes possession subsequently, is not liable for the supplies furnished before his possession commenced.

Although the bill of sale, or instrument by which the mortgagee exhibits his title, be absolute upon its face, he may show, nevertheless, by parol evidence, what the real nature of his interest was: and it is not necessary that the *defences* (or evidence showing the apparently absolute interest, to be a mortgage) should be in writing.

Where an action was brought against the defendants *jointly*, and all of them except one admitted their liability, it was held that the plaintiff was not entitled to recover against those, who admitted their liability without convicting him, also, who made defence.

Notice was given to the defendant, who contested the plaintiff's right to recover against him, to produce certain books relative to the vessel, which were kept by the ship's husband,—the other defendants admitting that they were in his possession. Held that their admissions would not affect the defendant, who made the defence, but that the plaintiff was bound to prove the books to be in his hands, before parol evidence of their contents could be offered.

THIS was an action of *assumpsit* brought against the defendants as owners of the ship De Witt Clinton, to recover the amount of a bill for certain chains furnished for that vessel.—The defendant, *Howland*, severed from the other defendants, in his defence, appeared by a separate attorney and pleaded the general issue.—*Morell* was defaulted, but the other defendants appeared by the same attorneys and made a joint defence.

The cause was tried before Mr. Justice Oakley, and at the trial the plaintiff proved the delivery of the articles for which the action was brought, to the master of the vessel.

The defendants, *Tucker*, *Carter*, *Williams* and *Packard*, admitted their part ownership, and that the amount claimed was

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due to the plaintiff ; and they were willing that a verdict should pass in his favour, provided *Howland* were made liable also. The latter in his defence introduced evidence to show that all the articles stated in the plaintiff's bill of particulars, except the two last, (amounting to the sum of £223 29,) were furnished before he had any concern with the vessel, and that his interest in her was that of a mortgagee merely.

It appeared at the trial, that the vessel was built by S. & F. Fickett, of the city of New-York, for themselves, and the defendants Tucker, Carter, Williams, Packard and Morell, and that originally *Howland*, had no interest in her. When the vessel was about to be completed, (viz., on the 24th of March, 1828,) S. & F. Fickett being desirous of borrowing the sum of \$8,000 of *Howland*, gave him an absolute bill of sale, of their interest in the ship, amounting to three eighths thereof, which was intended, however, as a mere collateral security for the loan. *Howland* never took possession, nor interfered with the vessel, until the month of July, 1828, when the Ficketts failed ; and then, with their consent, he sold out their interest in the ship, and credited them with the proceeds of the sale. The articles, for which this action was brought, were all furnished before *Howland* took any direct interest in the vessel, and before the failure of the Ficketts. *Howland*, for the purpose of proving that his interest in the vessel, although apparently absolute by the bill of sale, was in fact and truth but a mortgage, called F. Fickett as a witness : but the counsel for the plaintiff objected to the introduction of any parol proof to contradict or explain the written instrument, or to show that the bill of sale was given as collateral security for the loan. This objection was overruled by the presiding Judge, who was of opinion that if the bill of sale was intended as a mortgage only, that fact might be shown, by parol, and Fickett was sworn as a witness.

He testified that the bill of sale was given as a collateral security merely, and that *Howland* was to reconvey to the borrowers their interest in the vessel, upon being repaid the amount of his demand. The counsel for the plaintiff excepted to the opinion of the Judge, permitting this evidence to be given. It appeared further,

that the vessel, after she was completed, was put into the New-Orleans trade,—that one John W. Russell was appointed by the other owners, the ship's husband, and that all the accounts relating to the vessel were kept by him. At the trial, the counsel for the plaintiffs called upon the defendant, Howland, to produce the books of Russell, pursuant to a notice, which had been given for that purpose. But the counsel for Howland denied that they were in his possession, and contended that as his defence was adverse to that of the other defendants, who admitted their liability, and were interested to cause a joint recovery against *all*, the course for the plaintiff to pursue, was, to bring Russell into Court with the books, by a *subpoena duces tecum*.

The counsel for the other defendants, however, admitted that the books were in Howland's possession, and that he had not brought them into Court, pursuant to the notice. The plaintiff then offered to give parol evidence as to the contents of the books; but to this the counsel for Howland objected, on the ground that as the books were not proved to be in his possession, and he had denied that they were so, their contents could not be given in evidence against him.

The Judge decided that such evidence could not be given as against Howland, and the counsel for the plaintiff excepted to his opinion on this point.

The plaintiff then gave in evidence a certificate, produced from the Custom-house, bearing date the 31st of March, 1828, and signed by S. & F. Fickett,—setting forth that the De Witt Clinton was built under their direction, during that year, for Henry Packard, John H. Howland, Fanning C. Tucker, Robert Carter, Richard S. Williams, and Richard Morell. The certificate also set forth the dimensions and measurement of the ship, her burthen, &c. Upon this point Fickett testified that the certificate was given for the purpose of having the vessel enrolled, in obedience to the act of Congress, and that such certificates often express the names of persons other than those for whom the vessel was built. He also testified that Howland saw and approved of the certificate before it was filed:

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Upon this state of facts, the Judge charged the jury that the plaintiff was not entitled to recover as against the defendant Howland, for any of the articles furnished prior to the date of his bill of sale; and that as to the balance, it was for the jury to say, whether Howland was a mortgagee in, or out of possession, at the time the articles were furnished. If in possession, he would be liable, but not otherwise. The judge also instructed the jury, as this was a joint action, against all the defendants, that the plaintiff must recover against *all*, or he could not recover against *any*.

The counsel for the plaintiff excepted to this opinion and charge, and then submitted to a nonsuit, with leave to move to set the same aside on a case made.

A case having afterwards been made pursuant to this permission, the cause was now argued by *Mr. Sackett* for the plaintiff, and by *Mr. G. F. Tulman* for all the defendants except Howland. But as their object was to make Howland contribute, their counsel maintained the same propositions in substance which were relied upon for the plaintiffs.

They contended—

I. That parol evidence should not have been admitted to prove that the bill of sale from S. & F. Fickett to Howland was a mere collateral security or mortgage. That the instrument being a *deed* could not be controlled, explained, or defeated, by a mere verbal understanding between the parties; that upon the happening of a certain contingency, it should become inoperative. It is a general rule, that a deed, absolute in its terms, cannot be shown to be a mortgage by mere parol evidence. [13 Mass. R. 443. Coup. 47. 3 Camp. R. 57. 3 B. and Ald. 233. 1 Stark. 361. 2 B. and Ald. 367. 5 Cowen's R. 485. 12 J. R. 488. Stark. on Ev. 1002 to 1008. 2 Conn. R. 215.]

There is an exception to this rule, it is true, in chancery, which allows a deed *apparently* absolute, to be proved a conditional one, merely: but this exception is only applicable to those cases where a grantee fraudulently attempts to convert a deed which was intended to be conditional into an absolute one. And even this is

confined to cases between the immediate parties to the deed ; for a third person is not bound by the dealings between the original parties. [4 J. C. R. 167. 6 Ib. 417. 1 Ib. 594. 2 B. and Ald. 134.]

It will be found upon an examination of the leading cases, that a written defeasance of as high a nature as the deed itself, was executed in every instance at the same time with the original deed.

But suppose the testimony to be admissible,—what is its effect on Howland ? In judgment of law he was in possession, being part owner ; for the possession of one joint tenant is the possession of all. [JONES C. J. Not in this case, where you seek to charge him, by means of the possession of a co-tenant.]

But the three-eighths conveyed to Howland must have been in his possession, for the Ficketts had conveyed their interest to him. The possession must have been in them or in Howland. [JONES C. J. As the case stands, that point cannot be discussed. The plaintiff has submitted to a nonsuit, and for the purposes of this argument, Howland is to be deemed a mortgagee out of possession.]

The plaintiff should have been permitted to give parol proof as to the contents of the books kept by Russell, the ship's husband. They could not have been reached by a *subpoena duces tecum*, because they were not in Russell's possession ; and hence the general rule upon this subject is applicable to this case.

III. The defendant Howland was liable for the supplies furnished for the ship, even if he was a mere mortgagee. The plaintiff after having trusted the ship, goes to the Custom-house to ascertain who her owners are. He there discovers the names of all those persons who are made defendants ; and he brings his action against them. One of the defendants comes in and says that he is a mortgagee merely, and thus not liable. How was the plaintiff to know this ? If the defence is to prevail, he is taken by surprise ; for there was the same proof of ownership in Howland that there was in the other defendants. The defendant has put it upon record that he was a part owner of this ship,

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and he cannot be permitted to deny the fact, at a moment when it is his interest to do so. He must abide by his own act, and if he is an owner for one purpose, he is so for all. In the case of *McIntyre v. Scott* [8 John R. 160] there was a written defeasance given at the time the bill of sale was executed, and *Champlin v. Butler* (18 John, 169,) was decided upon the ground that there was a special agreement by the master, and that the facts of the case were known to all the parties concerned.

Again, if Howland is liable at all, then he is liable for the whole amount of the bill of particulars. One part of the charges cannot be separated from the other parts, for the defendants are liable as owners, if liable at all. [1 Cowen's R. 417. 3 Ib. 369. 20 John R. 122-3. 1 Saund. 207 n 2.]

The plaintiff was entitled at all events to a verdict against the defendants, who admitted their liability at the trial, and against the one who was defaulted.—[Upon this last point Mr. Talman contended, that the plaintiff must fail, unless *all* the defendants were liable. He cited 1 Chit. Plead. 30. 5 John R. 176. 11 Ib. 101.]

Mr. Slosson for the defendant, Howland contended :

I. That Howland had no interest in the vessel when that portion of the demand which precedes the 24th of March, 1828, was contracted, and therefore could not be liable for *that*. The other defendants admit *their* liability, and are in fact the party adverse to Howland; as a recovery against *him* would divide the debt for which *they* are at all events liable in a proper action. The equity of the case is clearly with Howland; for he loaned his money to the Ficketts for the purpose of enabling them to complete their contract with the other defendants. Most of the items for which the action is brought, were furnished before the date of the bill of sale, and *that* was given merely as a collateral security for the loan. Ought these real defendants, then, to succeed in charging Howland with a part of their debts?

II. The rule is well settled that a mortgagee out of possession is not liable for supplies furnished to the vessel; [*M'Intyre v. Scott*. 8 J. R. 160.] and it was supposed to be too well established to be disturbed. [The Chief Justice here intimated, that the Court did not desire to hear the counsel upon that point, but wished to know whether the defeasance could be by parol.]

*Slosson.* That point also I had supposed was settled by the case of *Champlin v. Butler*. [18 John, 169.] There is no reason why the parol evidence should not be admitted; for it does not in any way conflict with the deed.

The defendant merely offers to show, that there was a *loan*; and if there was a loan collaterally secured, then the security may be given in the form of an absolute deed. [*Strong v. Stewart*, 4 John C. R. 167.] That third persons are concerned incidentally in the transaction, can make no difference; for they have been in no way prejudiced by Howland's title. They have not trusted *him*, neither has credit been given upon the faith of his being a part owner. This is not pretended either by the plaintiff or the other defendants. But it is said, that by the register, Howland's ownership appears, and that he is concluded from asserting his real interest, by this documentary evidence. This point, too, has been fully settled by our own Courts, and the register is not evidence of ownership. [14 John R. 201.] It may be that the tribunals of Connecticut have established a different doctrine: if so, their decisions cannot control the law of evidence as it is settled here.

III. The books of Russell were not in the possession either of Howland or the other defendants, and of course parol evidence of their contents could not be given. The plaintiff should have compelled their production by a *subpoena duces tecum*, directed either to Russell or the person having charge of the books.

IV. It seems to be admitted by the counsel for the other defendants, that as this is an action on a joint contract, the recovery must be joint also. The rule upon this subject is also well settled, and if Howland be not considered liable, then the *non-*

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suit must stand. As the case is presented, all the facts are to be presumed to be in favour of the defendants ; for the plaintiff after offering his evidence, submitted to a *nonsuit*. We are therefore to have the benefit of all presumptions, and that the defendant, Howland is a mere mortgagee *out of possession*, is to be considered as proved before the Court.

*Per Curiam.* The principles upon which this case rests have already been considered and settled in the previous case of *Ring and M'Namara v. Franklin*. The defendant here, was a mortgagee out of possession, and his ownership had never been the cause or inducement of the credit which was given by the plaintiff. This being his situation in point of fact, he cannot be made liable for supplies furnished to the ship when he was thus out of possession, provided his real interest in the vessel was established by competent proof.

Upon this point the law seems to be well settled, that wherever there is a loan and a security furnished for that loan, the fact may be shown by parol proof, even though the instrument forming the security, be absolute in its terms and upon its face. It becomes a question of intention entirely, and if the parties intended that the apparently absolute deed should in truth be but conditional, then that fact may be shown in any form of proof which can establish it. It is not necessary that the defeasance should be in writing ; but the real object of the parties in forming the instrument may be proved by parol. The effect of the instrument is not confined to the immediate parties, at all events, if third persons are not prejudiced thereby. In this case there is no pretence that credit was given to this ship, in consequence of the interest, which was vested in Howland. His part ownership in no wise prejudiced the plaintiff, and Howland cannot be made liable from this cause.

As to the evidence which was offered to show the contents of the books kept by the ship's husband, we think it was rightly rejected at the trial. There was no proof that they were in Howland's hands, and the admissions of the other defendants, as to that fact, could not prejudice his rights. If the books were in Russell's

hands he should have been compelled to produce them in the ordinary way, by a *superna duces tecum*. At all events, parol evidence of their contents could not be given as against Howland, until the fact was proved that the books were under his charge. To this point no evidence was produced and the testimony offered was rightfully rejected.

As the plaintiff has brought his action against the defendants *jointly*, he must show a right of recovery against *all*, or be nonsuited. He has failed to show any liability on the part of Howland, and of course the motion to set aside the nonsuit must be denied.

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*Motion to set aside the nonsuit denied.*

[Sackett, *Atty for the plff.* W. Slosson, *Atty for the deft. Howland.*]  
[Hoffman and Tallman, *Atty's for the other defts.*]

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SAMUEL PARSONS, IMPLEADED WITH JOHN JEWETT,

*ads.*

BENJAMIN DE FOREST AND ALFRED DE FOREST.

In order to maintain an action of *assumpsit* against two trustees jointly, for money had and received to the use of the *cestuy que trust*, the plaintiff must prove a *joint promise*, either express or implied. As each trustee is, in general, answerable for his own acts only, the law will not *imply* a joint promise on the part of both to pay over the money in their hands to the *cestuy que trust*, from the mere fact that each trustee has, for himself, separately admitted that there were funds in his possession equal to the amount of the plaintiff's claim.

The plaintiffs in this case, being creditors of C. & D. (who had assigned their property to the defendants by a deed of trust for the benefit of certain persons, among whom were the plaintiffs) filed a bill in equity against the defendants. The defendants answered separately, and each in his answer admitted that he had received funds to a considerable amount out of the estate assigned, and that he then held in his hands a sum equal to the plaintiffs' demand, which he proffered his readiness to distribute according to the terms of the trust.

Upon an action of *assumpsit* against both trustees for money had and received to the use of the plaintiffs, founded upon these admissions, it was held, that the proof did not support the declaration, and that the plaintiffs could not recover unless they proved a joint promise on the part of both defendants.

THIS was an action of *assumpsit* for money had and received,—the declaration containing but a single count, which embraced the usual money demands and an account stated. The defendants appeared by different attorneys and separately pleaded the general issue.

The defendant Jewett, suffered a default to be taken against him, but Parsons appeared and defended.

The cause was tried before Mr. Justice OAKLEY, and at the trial, the plaintiffs, to support the issue on their part, produced and read in evidence a bill of complaint filed in the Court of Equity for the first Circuit of the State of New-York, in a case wherein George W. Wallis, and the present plaintiffs, and Charles and George Belden were complainants, and the present defendants

were respondents,—together with the separate answer of each defendant to said bill.

The bill stated, that one David Cromelien and David Davies, being indebted to the complainants in various sums of money, on the 23d day of March, 1827, became insolvent, and being possessed of considerable personal property, agreed upon a compromise with their creditors upon certain conditions. That in pursuance of this agreement, the said Cromelien & Davies made an assignment to the defendants, Parsons & Jewett, of certain goods, credits and choses in action, amounting in value to a large sum of money, upon the condition, that they should apply the proceeds of the same to the payment of the debts of the creditors named in a schedule annexed to the assignment according to the proportions therein specified ; and among said creditors were the plaintiffs in this suit, who were entitled to receive, under said assignment, the sum of \$934 21. The bill then stated that the defendants converted said goods, &c. into money, and that Jewett being applied to by the complainants according to the terms of the trust to make payment, expressed his willingness to do so, but alleged that Parsons had possessed himself of the proceeds of a large amount of stock, which had been conveyed to said trustees by Cromelein & Davies, together with the sum of \$2500, arising from the sale of said goods. The bill also asserted that Parsons being applied to for a like purpose, refused, under various pretences, to make any payment whatever. The bill then prayed for relief, and that Parsons might be removed from his situation as trustee, alleging, that he had threatened to apply said funds to his own use.

Parsons in his answer admitted, that he had received from the sales of stock and goods transferred to said trustees, the sum of \$8,392 12, but alleged that he had paid out on account of the trust, \$4,617 34, and that the difference between these two sums (\$3,774 78) remained in his hands. He denied any unwillingness on his part to dispose of the funds in his hands according to the trust, but alleged that he could not safely part with them, because he had been regularly served with a process of foreign attachment in the State of Connecticut, by the creditors of C. & G.

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Belden, whereby said funds were attached and held to answer that suit. He admitted that the present plaintiffs were entitled under said deed of assignment to receive the sum stated in the bill, and alleged that Jewett had in his hands funds unincumbered sufficient to meet the demands of all the complainants.

Jewett in his answer admitted the principal allegations in the bill, and also that he had received from the proceeds of the property assigned, the sum of \$27,801 83; but he alleged that of this sum he had paid out \$24,909 71 on account of the trust. The difference between these sums he admitted was in his hands, subject to the claims of the complainants and his own charges for commissions, and that the present plaintiffs were entitled to receive from said trustees the amount stated in the bill. Jewett also proffered his readiness to answer all claims upon the trust fund, but alleged that Parsons had received and retained in his hands the proceeds of certain stocks, which were intended to satisfy the claims of the complainants, but that he refused to pay them over without any just excuse.

By the terms of the assignment (which was attached to the answer of Jewett) it appeared that C. & G. Belden were not to be paid the amount of their claims, until after all the other creditors named therein were satisfied, and from the answers it appeared that all the said creditors except the complainants, had received the amount they were entitled to claim.

Parsons in his answer stated that the complainant Wallis was not entitled to receive any thing from the trustees under the assignment, as he was not mentioned therein, and because Jewett received a specific sum from Cromelein & Davies to answer that demand. Jewett admitted that Wallis was entitled to receive \$1800 (the amount of his claim) *under the assignment*, and stated that the only reason why Wallis was not formally named, was because his account was not liquidated. He admitted also that he had received from C. & D. the sum of \$2000 with which to satisfy Wallis' claim, but alleged that he received it under the trust, to be distributed according to the terms of the assignment.

It thus appeared that each of these defendants had in his hands a sum sufficient to cover the demand of the plaintiffs.

Upon this testimony the counsel for the plaintiffs having rested their cause, the defendants moved for a non suit ; but the motion was overruled by the presiding Judge, who was of opinion that the plaintiffs were entitled to a verdict. To this opinion the counsel for the defendants excepted. The jury returned a verdict in favor of the plaintiffs for \$1019 75, and the defendant, Parsons, now moved for a new trial.

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*Mr. W. S. Johnson* in support of the motion, contended,

I. That the matter in controversy formed the subject of equity jurisdiction only. The trustees under the assignment received different and very unequal parts of the proceeds of the trust-fund, which each had distributed for himself without concert with his co-trustee. Each then is answerable for his own acts, but nothing more, and they cannot in a court of law be called to an account jointly.

An action at law does not lie against a trustee except upon an *express promise* by him, and no case can be found where he has been held liable upon a promise implied from the mere fact of his reception of funds. [Coke Lit. 272 b. s. 404. 1 Coke Rep. 121 c. 2 Bulst. 336. 12 J. R. 276 *Weston v. Barker.* 5 Term R. 690.] A court of law cannot look into the accounts to examine the claims of the various parties, nor can it adjust the amount, which each is entitled to receive. Nothing but a court of equity can do complete justice between the parties, and therefore a court of law will not entertain jurisdiction upon the subject matter.

II. The attachments served on Parsons in Connecticut, are a bar to the plaintiff's right of recovery against him. Parsons in all his admissions, couples them with a statement of his liability to respond to the attaching creditors. He was perfectly willing to pay over the funds in his hands according to the trust, if he could do so with safety. He is justified in his refusal to part with them while those suits are hanging over him, and he cannot be compelled to part with any portion of those sums until the termination of that controversy. If the attaching creditors prevail in Connecti-

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cut, can Parsons pay over the funds, which he holds as *the trustee of C. & G. Belden*, to any but those creditors? Can he escape the consequences if he act thus imprudently, and will any Court compel him to assume a risk where he has no beneficial interest? If he be right then, in retaining the fund he must retain it entire, and a court of law will not sever it. [5 J. R. 100 *Embree and Collins v. Hanna.*] ]

III. The defendants are not *jointly* liable, as appears by the evidence. Each trustee is liable for himself but not for his co-trustee. If any action at law can be sustained against a trustee, it must be upon an express promise, and if the action be against *two*, then there must be a *joint* promise. Here each defendant answers for himself. Each admits that *he* has funds, and throws upon the other the obligation of paying this debt. These defendants are not jointly liable even in equity, and much less will a Court of law raise a joint promise from separate admissions. Suppose Parsons to have in his hands but \$500, while Jewett has \$1500: Can Parsons be made liable for any part of the sum in Jewett's hands? If the latter become insolvent, can the former be responsible for *his* delinquency? And if the whole sum be collected of Parsons by execution, must he pay the debt of another without funds, and take the risk of looking to a man over whom he has no control for remuneration? The law imposes no such hardship upon trustees, and this action cannot be maintained. *I. Hopk. R. 309—5 J. C. R. 296. 6 Ib. 16. 4 Vin. Ab. 534. 3 Equi. Cas. Ab. 742. Attor. Gen. v. Randall. 1. P. Will. 81. 2. Mad. 14 12. 11 Ves. 324. 2. T. R. 366.* ]

*Mr. Hugh Maxwell* for the plaintiffs observed.

I. That the Court had already decided when this case was formerly before them, (*Vol. I, p. 137.*) that the action should be a *joint* one against both defendants, and that the attachments in Connecticut formed no defence to the suit. The second point of the plaintiffs is at all events disposed of, and the first is not tenable even as an abstract proposition. It has been repeatedly and expressly

decided that a trustee may be sued in a court of law for a balance admitted by him to be in his hands for the *cestuy que trust*. It cannot be necessary to drive a plaintiff into Chancery where the defendant admits that he has a certain, fixed and specific sum in his hands to which the plaintiff is entitled. Where the accounts are unsettled and before any balance is struck, or before it is ascertained what amount the plaintiff is entitled to receive, it may be, that an action for money had and received will not lie against the trustee. But when he has converted the funds into money and has admitted the plaintiff's claim, and that he holds the money for him there can be no good reason for driving him to his bill in Equity, nor for ousting a court of law of its jurisdiction. At all events it is well settled that if there be a balance in the hands of a trustee, which he has *promised* to pay, that amount may be recovered in an action of assumpsit. [1. *Paine's Cir. Ct. R.* 636. 644. *U. S. v. Clarke* 12, *J. R.* 280. *Weston v. Barker.*]

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II. As to the attachment in Connecticut, there is no privity between the attaching creditors there, and these plaintiffs. The rights, which we have under a valid assignment, cannot be defeated by any such process, and this excuse will not avail. Besides, nothing was attached in Connecticut but the interest of the *Beldens*, who were to *have nothing* until all other creditors were paid. What peril, then, could be brought upon Parsons, even if he were to pay to us the sum, which he holds for our benefit? Would it not be a sufficient answer to any suit against him, that the funds in his hands were held in trust to pay certain creditors, and that by the terms of the trust, the Beldens were to have nothing until all other creditors were satisfied? Would it not form a good defence, if he were to say that the fund was exhausted before any rights of the Belden's attached? Their rights depended upon a contingency, and if the contemplated event did not take place, then those rights *could not attach*. It cannot be that Parsons had any fear from that source, and his only object is delay. At all events the excuse for not paying these plaintiffs is no defence at law, and it cannot avail any thing. [*Embree and Collins v. Hanna.* 5 *J. R.* 100.]

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III. The only real question is, whether there has been a *promise*, and if so, such a promise as will sustain this action.

Let us for a moment advert to the facts. It is asserted in the Bill in equity which has been admitted as evidence here, that Cromelein & Davies made an assignment to the defendants *jointly* of certain goods, credits and choses in action, which were to be converted into money and distributed among certain creditors of the assignors in given proportions, according to an indenture, to which Cromelein & Davies the defendants, and the creditors were parties. *Each* of the defendants, admits in his answer, that the goods, credits and choses in action so assigned were received by them *jointly*; that they were converted into money by the defendants, and that the proceeds have passed into their hands. *Each* defendant *admits*, that there are *now* funds enough in *his* hands, to satisfy the claims of the complainants, and each *alleges* further that his *co-trustee* has funds enough in *his* possession to pay this demand; and *both* defendants admit, that the plaintiff's claim is just, and that it ought to be satisfied. Each defendant proffers his readiness to do justice in the matter, but insists upon it that his *co-trustee* ought to pay this particular demand.

From these confessions we draw proof of facts enough to support this action. The plaintiffs have nothing to do with the collisions between the trustees, and are indifferent as to the issue of *their* contests. Neither have *we* any thing to do with hypothetical cases put by the ingenuity of counsel, and this Court is not called upon to give judgment against co-trustees, where *one* is *without* funds, and the other is full-handed. We take the case as it actually exists, and ask the Court, if the law does not impose an obligation upon the defendants *jointly* in a case where *each* is in possession of an abundant fund expressly appropriated to the payment of this debt? Is it any answer for Parsons to say, that true *it is*, the claim is just,—it ought to be satisfied, and *I* have the means of payment; but in an arrangement between myself and Jewett, it was agreed or understood that *he* should pay this debt, and he has the means of doing it: look, therefore, to him. Will an excuse like this lie in the mouth of Jewett as a defence, and

if the matters admitted in the answer were spread out as a defence at law, would they form a plea in bar of this action ?

If an execution go forth against these defendants, no *injustice can be done*, let the sheriff proceed as he will, for each defendant has in hands the money of the *real* debtors, intended to be applied to this very object, which he refuses to give up.

But we are told, that there is no *express* promise to pay. What if there is not ? there is an express admission of a debt due from Cromelein & Davies to the plaintiffs, and an express admission of funds in the hands of the defendants to meet this debt. Here is a direct acknowledgment of money had and received to the use of the plaintiffs, and for them ; and will not the law upon these confessions raise an *assumpsit* ? Is not the admission tantamount to an express promise, and can the defendants by a technical defence of this kind drive us from the straight course of the law into the circuitous paths of a court of equity ! And for what ? The defendants could have nothing there, which we refuse them here, and there can be no reason founded upon justice or good sense, which will defeat this action.

We rely upon the general principle of justice, upon which this peculiar action rests : *Ex equo et bono*, the defendants ought to pay us this money, and a court of law can compel them to do justice. But if authority be wanting, it is to be found in the case of *Weston v. Barker* to the full extent of our claims.

*Mr. S. P. Staples* in reply, observed that the difficulty in the way of a recovery in *this action*, was to be found in the fact, that there was no *joint* liability on the part of the defendants. The trustees are not liable for each other, and hence no joint action against them can be sustained except upon an *express* promise, and that promise must be a *joint* one.

The defendants are trustees created by a deed, containing an assignment for the benefit of creditors. The *cestuy que use*, has neither *jus in re*, nor *jus ad rem*, and hence can have no action at common law. His rights are *equitable* merely, not legal, and a court of equity is the only tribunal which has jurisdiction over the subject matter of the complaint. [ *Co. Lit. 272 b.* ]

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The case of *Weston v. Barker* so far from supporting this action is an authority to prove, that it will not lie, unless there has been an *express* promise. Judge Thompson did not intend to go beyond this point, and it will be observed that his opinion, even as reported, was not sustained by all his brethren. Spencer J. in an able and almost incontrovertible opinion, maintained the other side of the question, while Judge Platt gave no opinion upon the point at all.

The principle upon which we rely, is to be found in all analogous cases. Take a case of partnership, where accounts between partners are settled and a balance struck: there still cannot be a recovery by one partner against another at law, unless there has been an *express* promise. [*Murray v. Bogart & Kneeland*, 14 J. R. 322.]

The case of *Beach v. Holchiss* [2 Connec. R. 697] contains the same principle in another matter. That was a case of joint adventure, where a balance had been struck, but there was no *express* promise, and it was held that the action could not be supported. So in an action for a legacy, no action at law will lie against the executor, unless upon an *express* promise. [5. T. R. 690.]

The general principle is laid down by the Supreme Court of the U. S. in the 2d of *Wheaton's Rep.* 56, and is supported by all the authorities. "A trustee, merely as such, is in general only suable in equity. But if he chooses to bind himself by a personal covenant, he is liable." [8. *Taunt.* 263. *Holt's N. P. R.* 641.]

In this case the defendants are trustees merely, and the funds cannot be drawn out of their hands by an action at law.

The defendants *at all events* are not liable until the *trust* is *closed*, which is not the case here. The rights of Wallis are not ascertained, the defendants commissions are not fixed, and the amount to be distributed is not known. This of itself is a conclusive objection to the action. [*Chit on Con.* 88. *Com on Con.* 281, 301, 282, 302.]

II. But in equity even the liability is not joint, but separate. Each trustee is liable for the property in his hands, and for noth-

ing more. If all the money pass into the hands of one trustee, his co-trustee is not liable in any Court, unless he has improperly permitted the fund to be diverted from himself. [6 *John C. R.* 16. 452. *Mumford v. Murray*, and the cases already cited.]

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III. If the defendants are liable at all, it is upon the sole ground of an express promise, and that leads us to look into the evidence.

But in the first place it may be well to ask, what is an *express* promise? It is an undertaking or an agreement, to do or not to do a particular thing upon a sufficient consideration. What is an *implied* promise? It is the inference of law arising from a given state of facts. An express promise and an implied promise cannot exist at the same time concerning the same thing, for the implied promise will be merged in the express one.

In this case, even if the evidence should present facts from which an inference might arise, that Parsons ought to be made liable jointly with Jewett, it would still fall far short of what is required to sustain this action.

The declaration upon the face of it, for the purposes of this case, must be considered as stating an express promise: A mere assent cannot be construed into an express undertaking, even if there was one. But here there is no assent on the part of Parsons proved. The *bill* in equity is no evidence against the defendants for any purpose; neither can the *answer* of one defendant be used as evidence against the other. The only proof in the cause against Parsons is to be found in his own answer.

From that answer it appears, that the accounts are not closed, and that Parsons is ignorant of their real situation, as Jewett has kept them all. True it is that Parsons has money enough in his hands to pay this debt, and so has Jewett. But the fund in Parsons' hands is attached by the creditors of C. & G. Belden. If Parsons were to pay *this debt*, then those creditors would have no remedy, and the Beldens would draw out of Jewett's hands all the money remaining there. Now the proceedings in Chancery are still pending, and justice in that Court can be done to *all* the parties interested in the fund. But by sustaining this suit, you leap over that Court

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and undertake a task not suited to the constitution and powers of  
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It may be true, that the *trust* is joint, but it does not follow that its *obligations* are joint also. The trust would be joint if the funds had in point of fact all passed into Jewett's hands; but in such case, it will not be pretended, that Parsons would be liable in a court of law.

The result of the inquiry is, first, that no evidence of *assent* on the part of Parsons to the demands of the plaintiffs can be found; and second, there is nothing to show an *express* promise. There is a mere admission of funds in hand, which Parsons swears he is ready to distribute according to the terms of the trust. This admission raises no promise, which can sustain this action, and the Judge ought to have nonsuited the plaintiffs. The promise proved (if any such there be) and the promise implied are but *several* ones, at all events, and such proof will not sustain the declaration.

HOFFMAN J. After stating the facts observed, that the utmost extent to which the evidence in the cause went, was to show that *each* of the trustees had funds enough in his hands, arising from the proceeds of the property assigned, to pay the demand of the plaintiffs; and the question was, whether such proof could sustain this action.

The plaintiffs, in order to make the defendants liable, must prove an *express promise* on their part to pay this demand; and in order to support their declaration, they must also show that the promise was a *joint* one. There can be no doubt that *either* of these defendants, or *both* of them, might be made liable by an *express* promise to pay over to a *cestuy que trust*, an amount of money, which they held for him as trustees. But here no *express* promise is *proved*, and I doubt whether any can be *implied*, from the facts, which will sustain the action.

No case has been cited where an action has been maintained in a court of law against trustees, upon the mere ground, that funds had passed into their hands. If that position were correct, an action at law might always be maintained against trustees

to their great prejudice, and the utter confusion of their accounts. In the case of *Weston v. Barker*, Judge Thompson maintains his argument upon the sole ground, that there were facts enough in that case to show an *express* promise. He did not go beyond this point, and did not mean to give the latitude claimed here by the plaintiffs. In the case cited from Paine's Reports, his opinion was placed upon a ground entirely different from that assumed here, and that opinion cannot, therefore, aid the plaintiffs in this matter.

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As a general proposition, it is undoubtedly true, that a trustee is not liable to be sued by the *cestuy que trust* in a court of law, from any obligations resting on him as *trustee merely*. He may, if he choose, vary his responsibilities by his own acts, and by an express agreement. If he admit that he has funds in his hands for the *cestuy que trust*, and promise to pay them over to him, the law will find no difficulty in supporting the promise by a sufficient consideration. But if no promise be proved, it cannot be *implied* as an inference of law from a given state of facts. A case may exist where the Court or jury might *infer* that an express promise was made, although not proved in direct, explicit, and unequivocal terms. The *necessity* of proving an express promise is one thing, and the *mode* by which it shall be done is another.

From the facts shown in this case, I take it to be clear, that the remedy of the plaintiff is in chancery; and creditors in such cases must look to that tribunal. It is certainly true, that here is no joint promise proved, and yet such a promise is absolutely necessary to maintain a joint action.

The most that could be claimed under the facts, would be a several action against each trustee, upon his own admissions; for then his answer would be evidence against himself. The general rule is, that each trustee is liable for his own acts and not for those of his co-trustee, although some exceptions to this may be found. But here the answer of Jewett is no evidence against Parsons; and the latter cannot be convicted except by his own admissions. But he has not confessed a joint liability and a new trial must be granted. I think, however, that the remedy of the

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plaintiffs is properly in equity, and if they choose to be nonsuited, they may take that course instead of proceeding to a new trial.

Oakley J. after stating the facts. I am satisfied, on reflection, that I ought to have nonsuited the plaintiffs at the trial. The action being against the defendants jointly, a joint promise must be proved, either expressly or impliedly. There is no proof of any express promise, either jointly or severally; and the law cannot, as against these defendants, imply a direct promise, from the fact that each is in possession of funds, sufficient to discharge the debt, and that it is the duty of each to pay it. The rule appears to be well settled, that trustees are not jointly liable to the *cestuy que trust*, unless they have made themselves so by some joint act. Each is responsible for his own acts, and for the money that he receives. *Kirby v. Turner and others*, 1 Hop. Ch. R. 309. *Morrell v. Morrell*, 5 J. C. C. 296.]

In the absence, then, of any evidence of an express promise on the part of the defendants, it seems that the law cannot raise a joint assumpit; as their responsibility to account for and pay over the trust funds is, in its nature, separate and distinct.

I do not mean to give any opinion on the point, whether, under the peculiar circumstances of this case, an action at law will lie against either of the defendants separately. The plaintiffs have, no doubt, a perfect and easy remedy by application to the Court of Chancery, to compel an execution of the trust.

New trial granted.

[W. P. Hawes, Atty for the plf's. W. S. Johnson, Atty for Parsons.
J. W. Girard, Atty for Jewett.]

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JOHN WHEELWRIGHT

Wheelwright
v.
Moore.

versus.

JOHN A. MOORE.

The defendant executed the following instrument of guaranty in favor of the plaintiff.

New-York, December 5th, 1827.

"Whereas Noah Scovell of the City of New-York, has this day passed to John Wheelwright of the said city, his three promissory notes, of which the following are correct copies; (setting forth the same) "amounting together to \$10,590 and 80 cents; now in pursuance of the understanding and agreement between the said John Wheelwright and the said Noah Scovell, I do hereby guaranty the just and full payment of the said notes to the said John Wheelwright or his order, and should any default of payment thereof be made by the said Scovell, I bind myself for the full amount of such default." (Signed)

John A. Moore.

The plaintiff proved that Scovell on the 25th of November, 1827, came to him for the purpose of purchasing a quantity of barilla, and offered to give the defendant as a surety. That he accepted the terms, sold the barilla to Scovell, and on the 4th of December following delivered a part of it to him. Scovell gave his notes to the plaintiff for the amount of the barilla, and about three hours after they were given, the notes and guaranty were presented to the defendant, who immediately executed the guaranty and delivered it to the plaintiff.

HELD, that this was all one original and entire transaction, and that the sale and delivery of the goods to Scovell supported the promise of the defendant as well as the promise of Scovell, and formed a good consideration for both. HELD, also, that the declaration (which counted on the promise as a *collateral* one,) being according to the facts of the case, was correct in its form, and in all respects sufficient.

Assume it, upon a guaranty, executed by the defendant.

The same case in substance, had been before the Court on two former occasions, once upon a demurrer to the plaintiff's evidence, [Vol 1, p. 201.] and again upon a demurrer to the plaintiff's replications to the defendant's pleas. [Ib. 648.]

The declaration in the present instance contained two special counts; the first stating in substance, that on the 5th day of December, A. D. 1827, in consideration that the plaintiff would, at



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the special instance of the defendant, sell and deliver to one Noah Scovell a large quantity of merchandise for the sum of \$10,590 and 90 cents ; the defendant undertook and faithfully promised to *guaranty* to him, or his order the payment of three several promissory notes, bearing date respectively on the said 5th day of December ; the first being for \$3,530 and 27 cents, payable seven months after date : the second for \$3,530 and 27 cents, payable in nine months after date, and the third for \$3,530 and 26 cents, payable twelve months after date. It then averred the sale and delivery of the merchandise to Scovell for the above amount, payable in Scovell's three several notes of the tenor above set forth, and that the *first* note had become due, but was not paid by Scovell, whereby the plaintiff became liable, &c.

The second count differed from the first in nothing, except in confining the guaranty to the first note, the consideration being the same with that set forth in the first count.

Plea, the general issue. The cause was tried before Mr. Justice OAKLEY.

At the trial, the plaintiff's counsel offered in evidence, the guaranty of the defendant, containing copies of Scovell's notes exactly set forth in the declaration in the former case. [Vol. 1 p. 202.] He then read the deposition of one Daniel McLaughlin, which stated, "that on the 25th day of November, 1827, Scovell went to the Compting House of the plaintiff, for the purpose of purchasing a quantity of barilla of him, and offered the defendant as a guaranty, for the payment of the same. That after making inquiry as to the "stability" of the defendant, the plaintiff on the 30th of November agreed to sell Scovell 242 tons of barilla for forty four dollars per ton, (amounting to \$10,590 and 90 cents,) at a credit of seven, nine, and twelve months, *with the defendant as a surety*. That the witness (who was acting as bookkeeper to the plaintiff) then entered a memorandum of the sale in the plaintiff's sales book, and the memorandum was immediately communicated to Scovell, who assented to it, and suggested that the word "guaranty" should be substituted for the word "endorsed," which the defendant had written. Afterwards, (but on what particular day, the witness did not recollect,) Scovell gave his three promissory

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"notes to the plaintiff for the whole amount of the purchase money, and in about *three hours* after they were signed by Scovell, the witness carried them, together with the guaranty containing copies of the notes to the defendant, who then executed the guarantee. Moore, the defendant was not in the compting room of the plaintiff, nor present at the time, when the agreement between him and Scovell was made."

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All that part of the deposition, which related to the transactions of Scovell and his conversations with the plaintiff at his office, was objected to at the trial by the counsel for the defendant; but the objection was overruled by the Judge.

The plaintiff then offered to prove, that the sale of a quantity of barilla formed the consideration of Scovell's notes, and that a part of it was delivered to him on the 4th day of December, 1827. This evidence was objected to on the part of the defendant; but the objection being overruled, the plaintiff proved the delivery of a part of the barilla to Scovell on the 4th of December, and also that it formed the consideration of the notes.

The plaintiff having shown that the note described in the declaration had become due, but was unpaid; the defendant's counsel moved for a nonsuit, but the motion was denied by the Judge. A verdict was then taken in favor of the plaintiff, for \$3,653 and 82 cents, to be considered as subject to a case, either party having leave to turn it into a special verdict or bill of exceptions.

A case having been made, the cause was now argued by *Mr. J. Anthon* for the defendant, and by *Mr. Wilkes* for the plaintiff. For the defendant it was contended

I. That the promise of the defendant as disclosed by the guaranty was *collateral*, and as such was declared on by the plaintiff. The consideration for the promise must therefore not only be in writing but must appear on the face of the instrument of guarantee. [*Fell on Guar.* p. 20, 21 (*n.*) 2 *D. & E.* 80. 8 *John. Rep.* 29. 11 *Ib.* 271. 4 *Ib.* 281. 13 *Ib.* 175.—In this case, the consideration so appearing, is there stated to be "*the understanding and agreement between Wheelwright and Scovell.*" This consideration is unintelligible without recourse to oral testimony, which it was the

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express object of the statute of frauds to exclude. All parol testimony therefore to explain the consideration was inadmissible under the statute.

II. The parol testimony of the matters, which took place between Scovell & Wheelwright, in the absence of Moore was upon every principle inadmissible.

III. Under the statute of frauds the written contract must speak for itself, and it contains the sole evidence of the terms, upon which the defendant consented to be bound. All the testimony therefore as to the consideration of Scovell's notes was inadmissible.

IV. The interval of time between the signing and delivery of the notes and the signing and delivery of the guaranty, takes the case out of that class of decisions, which, by reason of the simultaneous execution of the original and collateral contracts, treat both as forming one original contract. [3 Bing. 107. 5 Mass. Rep. 358. *Hunt v. Adams, and the cases before cited.*]

There is no evidence that the witness McLaughlin communicated to Moore the terms, upon which the plaintiff had agreed to receive his guaranty of Scovell's notes. There is therefore no connecting link between the plaintiff's contract with Scovell and the consideration for the defendant's promise ; nothing to show that there was but one transaction, and one consideration, passing among the parties.

In the case of *Leonard v. Vredenburgh* the parties were all together, when the note was given and endorsed, and the consideration furnished. So in the case of *Bailey v. Freeman*, and in that of *Nelson v. Dubois*, there was but one transaction. Here the promissory notes were first made and delivered : three hours afterward the defendant was applied to for his guaranty of the notes. Moore was not present when the original contract was made, but that was perfect and *in esse*, at the time the defendant was solicited to execute *his* agreement. This therefore was clearly a collateral contract, made subsequently to the original one, and is void for the want of a consideration.

V. If the case falls within the class of cases referred to, the plaintiff has not treated it as such, he ought in that event to have declared upon it as an *original* and not a collateral contract. The plaintiff is in this dilemma: if he assumes the contract to be an *original* one, then he has no count in his declaration to meet it. If it is a *collateral* one, then there is no consideration to support it.

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Mr. Wilkes, for the plaintiff.

The giving of the notes and the execution of the guaranty were concurrent acts, and one and the same transaction. By the evidence of McLaughlin, the plaintiff has supplied, we think, what the Court considered upon the former trial as a defect in his proof. This evidence was clearly admissible, to show as part of the *res gestae*, that the giving of the notes by Scovell and the guaranty by the defendant were the same transaction and founded on the same consideration. Where the jury have found a verdict, subject to a case, every thing fairly inferable from the verdict is to be taken in favor of the successful party. Here we have a right to infer, for we think the jury would have found, that the defendant knew perfectly well before the contract was made between Scovell and the plaintiff, that his guaranty would be required, because Scovell *proposed* to give this security, at the time when he asked for the credit.

After the terms of the contract between the original parties were digested, Scovell gave his notes to the plaintiff, who in pursuance of the agreement, sent his clerk immediately to the defendant for the purpose of obtaining the required security. The defendant, without hesitation and without *inquiry* signed the guaranty and delivered it to the plaintiff; under these circumstances, is it not fair to suppose that Moore had been made acquainted with the arrangements between Scovell and the plaintiff, and had assented to them all? The plaintiff would not have delivered the barilla on the 4th of December, if he had supposed that the giving of the guaranty by the defendant was subject to any contingency: on the contrary, he considered it as a part of the original contract, and so all the parties treated it. We therefore consider the fact as

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established, that the giving of the notes and the guaranty were all one transaction.

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II. The guaranty being an essential branch of the same transaction with the giving of the notes, it required no new or distinct consideration passing between the plaintiff and the defendant to support it ; but it is upheld by the same consideration which supports the notes. [*D'Wolf v. Rabaud et al.* 1 Peters' U. S. Rep. 477.] This is what is termed an *original, collateral* contract. It is original as to *consideration*, because made at the same time with the principal contract ; but is collateral as to *promise*, because the faithful performance of another's contract is guaranteed. This distinction is well settled in our own Courts, and the law upon the subject is also well settled. The defendant relies upon the case of *Wain v. Waiters*, and the class of decisions in England following that case. The authority of that decision has been denied in Massachusetts, [17 Mass. Rep. 122,] and it has been questioned in the Supreme Court of the United States. [*D'Wolf v. Rabaud, supra.*] The principle of that case as admitted by our Courts, however, goes only to this point ; that where the original debt was perfectly *in esse*, independent of the collateral one, and the collateral contract was afterwards superinduced upon the original one, then not only the contract itself, but its consideration, must appear in writing. In such case the original consideration cannot be the consideration of the collateral contract, but the latter must rest upon some new foundation. But here there could be no *distinct* consideration, for there never was but *one*, moving between the parties, and that was the credit given to Scovell.

III. The evidence offered at the trial was competent to explain and ascertain what the agreement between Scovell and the plaintiff was, as referred to in the guaranty ; it not being in contradiction, but in furtherance of it.

OAKLEY J. When this cause was formerly before us on a demurrer to the plaintiff's evidence, we considered, that the case was defective, in not showing the consideration for the defendant's prom-

ise, which the declaration alleged. The guaranty of the defendant was alone, in proof. That guaranty was written under copies of the notes made by *Scovell*, which purported to be for *value received*, and although we considered that a sufficient consideration to support the guaranty, yet it did not accord with the consideration set up by the declaration, which was the sale of goods by the plaintiff to *Scovell* at the defendant's request: and we held, on the authority of the case of *Leonard v. Vredenburgh*, [8 J. R. 29.] that parol proof was admissible to show, that the actual consideration of the defendant's promise, was the sale of goods to *Scovell* at his request.

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In the case, as it now presents itself, it is sufficiently proved, that previous to the giving of the notes by *Scovell*, he applied to the plaintiff to purchase the goods in question, and offered the defendant as his surety; that the plaintiff agreed to sell the goods upon the guaranty of the defendant for the payment; that the notes of *Scovell* were signed by him; and the agent of the plaintiff, about three hours after they were so signed, called with them on the defendant; that copies of the notes were made, and the guaranty of the defendant written under the said copies. The goods sold were partly delivered to *Scovell* on the day preceding the date of the notes; and the guaranty is stated to have been made in pursuance of the agreement and understanding between the plaintiff and *Scovell*.

The facts in this case show with sufficient clearness, that the promise of the defendant to guaranty the payment of the notes was a part of the original negotiation between the plaintiff and *Scovell*; that the defendant must have understood the nature of that negotiation, and that the plaintiff had agreed to part with the property, on the security of his guaranty. The sale and guaranty, therefore, in the language of *C. J. Kent*, in *Leonard v. Vredenburgh*, were all one original and entire transaction, and the sale and delivery of the goods to *Scovell* supported the promise of the defendant as well as the promise of *Scovell*. The case seems to fall directly within the principles of *Leonard v. Vredenburgh*, and of *Nelson v. Dubois*, [13 J. R. 175.] which latter case is very similar, in all respects, to the present. The case of *Bailey & Bo-*

June Term, 1839. *Gert v. Freeman*, [11 J. R. 221] is also in point, and is also similar to the present.

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The interval of time which elapsed between the signing of the notes and of the guaranty, does not destroy the entirety of the transaction. Both acts were done in pursuance of the original agreements, and the one must necessarily have preceded the other. The contract made with *Scovell* was not past and completed, until the guaranty was given by the defendants. In *Bailey & Bogert v. Freeman*, the guaranty was signed at a different time and place from the original agreement. There is no foundation for the objection to the form of the declaration. It is strictly according to the facts of the case, and agrees in all respects with the declaration in the case of *Nelson v. Dubois*. The plaintiff is entitled to judgment.

Judgment for the plaintiff, on the case made.

[H. & E. Wilkes, attys. for the plff. E. Anthon, atty. for the deft.]

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versus

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THE NEW-YORK DRY-DOCK COMPANY.

No person can lay the foundation of an action against another, by a wrong on his part, or by a neglect or breach of his own duty.

The defendants were proprietors of a certain dry-dock, with a machine to raise vessels out of the water, for the purpose of cleaning and repairing their bottoms. The plaintiffs hired this machine, and placed a vessel upon it, under the direction of their own agents and workmen; and in an attempt to burn off the tar from her bottom, the vessel took fire, and was much injured. An action being brought by the plaintiffs against the defendants for negligence on their part as to the manner in which the machine was kept, and for its improper construction in a certain particular, the defendants proved that the injury to the vessel was occasioned by carelessness and neglect on the part of the plaintiffs in the use of the machine. The Judge charged the jury, that if the injury were attributable to carelessness, or want of common precaution on the part of the plaintiffs, in the use of the machine, the defendants were not liable; and the jury having returned a verdict for the defendants, a new trial was denied.

This was an action on the case for injury sustained by a vessel belonging to the plaintiffs, while on a rail-way, or inclined plane belonging to the defendants, for repairs.

The declaration contained two counts. The first set forth that the plaintiffs, on the first day of May, 1827, were the owners of a brig called the Eagle, and that the defendants were the owners of a certain dry-dock or rail-way, "intended and held out by them for the receiving and repairing of ships and vessels, which they were bound to keep in good order and repair, and in a state and condition suited to the purposes aforesaid." That the defendants "hired the same to the plaintiff for a certain reward," "to receive the said brig for the purpose of repairing the same, yet, the defendants not regarding," &c., "kept the said dry-dock or rail-way in a state and condition so unsuitable to the purposes of repairing ships or vessels," "that by reason thereof, and of great quantities of combustible materials, which they" "had

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"carelessly, and negligently, and contrary to their duty as afore-said, allowed to accumulate and attach to the said dry-dock or "rail-way," the said brig, in the course of her repairs, through the unsuitable condition of said rail-way, took fire, and was greatly injured, &c."

The second count alleged, that the defendants received the plaintiffs' vessel on their rail-way for repairs, but "so negligently and carelessly managed their said rail-way, or dry-dock, that the same, by and through the *carelessness and mismanagement* of the defendants," "took fire, whereby, and by means of the defective construction of said dry-dock, or rail-way," the said brig was greatly injured, &c.

The defendants pleaded the general issue, and the cause was tried before Mr. Justice OAKLEY.

At the trial, it appeared that the dry-dock or rail-way referred to, was a machine by which vessels are drawn out of the water upon an inclined plane, for the purpose of cleaning, graving, and repairing their bottoms. It consists of a cradle, which, after receiving the vessel, is drawn up the inclined plane with the vessel upon it, to a given distance out of the water, on ways prepared for that purpose. When the vessel is thus drawn up, the cradle is secured by palls, which fall into certain grooves in the ways, at the bow and stern of the vessel, by which she is fixed in her place. When the repairs are finished, the palls are raised, and the cradle, with the vessel upon it, glides down the inclined plane until the vessel meets and is buoyed up by the water.

It also appeared by the testimony of one Leslie, whom the plaintiffs called as a witness, that he had been employed by the defendants early in March, 1827, to examine the dock, and state any objections, which might exist in regard to it. The witness found a quantity of combustible matter beneath the cradle, consisting of tar, pitch, and oakum, the remains of the graving and repairing of vessels, which had been allowed to accumulate gradually there. This combustible matter extended the whole length of the under surface of the cradle, and the witness considering it as dangerous, recommended that the whole space under the cradle should be covered over with earth. He made the same rep-

presentation to the defendants afterwards repeatedly, but no notice was taken of his caution. The witness also observed that the *pawls* were secured by *ropes*, and he told the President, that they were unsafe,—stating that in case of fire, the ropes would be destroyed, and the pawls fixed in their grooves, so that the cradle and vessel could not be launched into the water. He therefore recommended, that *chains* should be used instead of *ropes*, for the purpose of raising the pawls. To these representations the President replied, “the men must be the more careful.” Leslie also recommended, that the sleepers of the cradle should be covered with a preparation of lime; and on one occasion, he represented the danger to two of the directors of the Company, who having spoken to the President in relation to it, were answered, that there was no danger, and that the Company were insured. The President, however, suggested, that buckets should be made ready in case of fire, but the witness thought they would be useless. The witness further stated, that he suggested various other precautions, which being disregarded, he left the employment of the defendants, eight days before the injury complained of in the declaration, in order to avoid the responsibility of such an accident. After the witness had left the Company’s employment, the President seemed disposed to adopt his precautions, and wished him to speak to the defendants upon the subject. Nothing, however, was done to avoid the danger.

The witness also stated, that the bottoms of several vessels had been burned off, while upon the cradle, without any injury from the fire. When the flames were too vehement, they were subdued by brooms prepared for that purpose. After the accident happened to the brig Eagle, chains were attached to the pawls instead of ropes, and the bottom of the cradle, where the combustible matter collects, was covered with sand.

The plaintiffs called several witnesses, from whose testimony it appeared, that the plaintiffs were the owners of the brig Eagle, described in the declaration; that she was a new vessel, which had been launched a few weeks before the accident, and her bottom *payed*. The plaintiffs being anxious to have her coppered expeditiously, had hired the defendants’ rail-way, and employed their own (*plaintiffs’*)

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men to do the work, it being the sole duty of the defendants to raise the vessel out of the water, and to return her there again. The whole of the premises were open to the inspection of the plaintiffs and their agents, and the combustible materials collected were visible to all the workmen. It further appeared, that previously to the coppering of the vessel, it was necessary to have her *graved*, and for this purpose empty tar-barrels were prepared, which being sawed asunder, and placed under the parts to be burned, were set on fire, and the flames thus communicated to the vessel's bottom. When this process is resorted to, buckets and brooms are prepared, that in case of accident from the fire, or if the flames are too great, the fire may be reduced or extinguished. From the testimony of these witnesses, it also appeared, that the burning of this vessel was conducted in the usual manner; but when the fire was communicated to the tar upon her bottom, a part of it dropped upon the combustible matter below, which being thus set on fire, instantly blazed up about the vessel, drove the workmen from the rail-way, and resisted all efforts for its extinguishment, until after the combustible matter was totally consumed.

It also further appeared that the ropes attached to the pawls were burnt off, by which means the cradle became fixed in such a manner, that it could not be launched: if, however, the pawls had been secured by chains, the witnesses were of opinion, that the cradle with the vessel upon it might have been launched into the water within *two minutes*, and the fire thus extinguished. The injury to the vessel exceeded two thousand dollars, and the plaintiffs were compelled to repair her at their own expense.

The defendants, on their part, called several witnesses to show that the fire was communicated to the vessel and the combustible materials entirely by the carelessness of the agents and workmen of the plaintiffs, especially by the haste and obstinacy of the master of the Eagle. That before any vessel's bottom can be safely burned upon the rail-way, it is necessary to prepare brooms and pails of water, that in case of too much flame, its progress may be *instantly* arrested. That in this case, the master of the Eagle took upon himself to direct the operations, and although warned repeatedly against the consequences, he caused fire to be applied

to the vessel's bottom before either brooms or buckets were prepared. That by this means the fire had made such progress before any attempts could be made to arrest it, that it became impossible to extinguish the flames before the injury was done. The witnesses also testified, that if brooms and water had been prepared, the evil might have been prevented, but that the vessel's bottom was not in a safe state to be burned, as she had been recently *payed*. Upon these points, however, the testimony was contradictory, the weight of it being with the defendants.

Upon these facts, the Judge charged the jury, that it might well be doubted whether the defendants were liable for any injury sustained by the plaintiffs, in consequence of the alleged insecure situation of the rail-way, as every body was free to use it, or not, it being open to inspection in all its parts. For the purposes of this trial, however, he charged the jury, that the defendants were liable for all damage resulting from their neglect to keep the rail-way in a secure situation, *unless the injury arose from the negligence of those, who used it.* That they were not, however, bound to keep it in such a state as to guard against hazard arising from the negligence of the plaintiffs or their agents. If, therefore, the jury believed, that the persons employed about the vessel did not act with ordinary prudence, and use the common and usual precautions against fire, or if the vessel was not in a situation to be safely graved, or was exposed to unusual hazard from the state of her bottom, that then the defendants were not liable.

The jury returned a verdict in favour of the defendants.

Mr. J. Anthon, for the plaintiffs, now moved for a new trial, and contended, that under the first count, the Judge ought to have charged the jury, that the defendants were liable for the injury sustained by the plaintiffs, if there was such negligence on the part of the defendants as was charged in that count, and if damage ensued therefrom to the plaintiffs. That the whole body of the evidence showed conclusively, that this negligence did exist; that it exposed vessels to great danger, and required more than ordinary care on the part of those engaged in graving them. That the Company had notice of the danger, and were warned against

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[*Mahew v. Borie*, 1 Stark. R. 423. *Clay v. Weed*, 5 Esp. R. 44.]

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II. The second count, besides the averments of negligence, contained an additional averment of a defective construction of the rail-way, and ascribed the damage to *both* causes; the negligent accumulation of the combustible materials and the defective construction also. On this count, the Judge should have charged the jury, that if the rail-way was defectively constructed, and any danger proceeded from that source, they ought to find for the plaintiffs. He contended that the evidence clearly showed defects in the construction, and proved, that if chains had been used in the place of ropes, the pawls might have been raised, and the vessel launched into the water. Upon this point, the defendants were expressly warned, and having neglected to remedy the defect until after the injury had been done, they were liable to the plaintiffs.

That if these matters did not form a cause of action, as set forth in the declaration, the defendants ought to have demurred. But having joined issue upon them, the plaintiffs were entitled to a specific finding on the facts under the charge of the Judge: *valeat quantum valere*. If such negligence and mal-construction existed on the part of the defendants, want of due precaution on the part of the plaintiffs would never release the defendants from their liabilities.

III. On the whole case, the weight of evidence showed, that the injury proceeded from the combustible materials collected below the cradle, the burning of which produced the injury complained of. The Judge erred, therefore, in not charging specifically on the case as stated in the declaration, and secondly, in charging, that carelessness on the part of the plaintiffs, *neutralized*, in effect, the negligence of the defendants, and relieved them from the liability attaching to them, from the unfit condition, and defective construction of the rail-way. [*Townsend v. Sus. Turnp. Co.* 6 John. R. 90.]

IV. As the Dry Dock Company enjoy privileges by public grant, on the condition of having proper rail-ways, all rules are to be interpreted strictly against them for the benefit of the community.

V. The verdict was against the evidence.

As to the general question, Mr. Anthon contended, that in all cases where one person holds out to another his power and ability to do or perform any thing for a reward, he is liable for negligence and unskilfulness. He said, that our law upon the subject was borrowed from the civil law, and that he, who lets a carriage or machine, warrants against all defects. So he, who hires out casks, which are defective, is liable by the civil law for the consequences; and if one let a pasture having poisonous herbs therein, he would be liable by the same law, for the injury they might occasion. This is also our law of bailment in one of its branches, (*locatum*), as appears from Jones on Bailment, (page 49,) and *Coggs v. Barnard, Ld. Ray*, 902. [He cited also, *Pandects, Lib. 19, ti. 2, Law 19, sec. 1, (si quis dolia.) Nap. Civ. Code, B. 3, tit. 8, chap. 2, sec. 1721, (page 198 of trans.) Pothier, vol. 2, 65 to 72.]*

Mr. Jay and Mr. Baldwin, for the defendants *contra*, contended, that the cases cited on the other side did not apply. That in this case, there was no special agreement whatever. The dock was open to the inspection of all persons desirous of hiring it; and the defendants let it out to the plaintiffs in its actual condition, without warranty of any kind. The plaintiffs and their agents knew and understood the actual condition of the rail-way, and were aware of all the precautions necessary for its use. The *pawls* were exposed to view, and the plaintiffs were aware, when they hired the rail-way, that the pawls were secured by ropes. They knew the hazard originating from fire, and were aware, that the ropes were liable to be destroyed. The defendants are not bound by their *charter* to keep the dock in repair, and they have no monopoly. There are other rail-ways in New-York, and the defendants may, if they choose, allow their's to sink into decay. The defendants, in fact, undertake nothing; they exhibit their dock, and allow all parties to use

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it, who choose to pay the hire, and take the consequences. Here the plaintiffs employed their own agents and workmen, and the jury have found, that the accident proceeded entirely from the negligence of the plaintiffs and their agents.

Upon this point, the charge of the Judge was altogether too favourable to the plaintiffs, and they cannot have a new trial from any error in the *charge*. If there be cause of complaint anywhere, it is with the defendants.

A party, who uses a machine of any sort, must adopt ordinary care and precaution in its use, or he cannot complain of defects; and this is a principle of common sense as well as of law. [*Butterfield v. Forrester*, 11 East. 60. *Esp. N. P.* 218, (599, old ed.) 1 Cowen 78, (*Bush v. Brainard*). 1 *Ventriss*, 310. *Com. Dig. action on the case, B.* 4.]

There was no objection at the trial, as to the charge in relation to the admission of the evidence of negligence, on the part of the plaintiffs. They are too late, therefore, to complain, even if there was a cause of complaint. But there was no negligence in fact, as it was clearly proved, that the injury received by the *Eagle* might have been prevented by the plaintiffs, with ordinary care, and would never have occurred, but for gross negligence on their part. There is no reason, therefore, for a new trial, as the charge was favourable to the plaintiffs, and the jury found according to the evidence.

HOFFMAN J. It appears from the evidence presented by the case, that when fire is about to be applied to a ship's bottom, water and brooms are usually provided, to guard against accidents; and that with these precautions a vessel may be safely graved. The plaintiffs, although warned that there would be hazard, unless such care was taken, having neglected all the usual precautions, cannot find an action for damages upon their own negligence.

The rule of the civil law, I apprehend, does not sustain the counsel for the plaintiffs in the position he has taken; because from the testimony it clearly appears, that they have suffered entirely from *their own* carelessness and want of caution,—even if there was some negligence on the part of the defendants. In

order to lay the foundation of an action against the defendants for a negligence of this kind, the neglect complained of, must be the *cause* of the plaintiff's loss. But in this case there is no evidence to sustain the principle, upon which the action rests. I see no error in the charge of the Judge, and am satisfied, that the motion for a new trial must be denied.

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But as the second count of the plaintiffs' declaration charges upon the defendants a mal-construction of a part of the machine, which they let to the plaintiffs, it may not be improper to ascertain, whether there is any just cause of complaint from that source. The *pawls* attached to the cradle, it seems, were secured by ropes; and the plaintiffs insist, that these pawls should have been secured by *chains*. But it seems to me, that the defendants were hardly bound to take such a precaution, since they could not have anticipated a fire, which should extend to the cradle. But if this was a defect in the machine, it was an *apparent* one, and open to the plaintiffs. If they thought the rail-way insecure, they were not bound to use it; and the defendants in my view of the case warranted nothing connected with their rail-way. A commission merchant is not bound to store his goods in a fire-proof building, although they would be much safer there than in a wooden warehouse. The law leaves the owner to effect insurance in such cases, and imposes no obligation on the commission-merchant, to seek a place of storage, which is absolutely secure.

In this case, although the rail-way would have been safer, if the pawls had been secured by chains instead of ropes; still the defendants were not bound to provide chains,—since the plaintiffs were at liberty to exercise their own judgments, as to the safety of the machine.

Suppose the defendants had persisted in the use of ropes, after the accident took place; could their customers complain of this resolution? They have the option to use the machine or not to use it, as they may think proper, and they must rely upon their judgments as to its safety. It is true the ropes were burnt, and by that means the plaintiffs were deprived of the power of launching the cradle and vessel into the water: but it must be remembered, that the ropes were destroyed by a fire originating in the

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plaintiffs' negligence. The injury did not in fact proceed from any defect in the machine, but from want of caution on the part of the plaintiffs, and they cannot, therefore, sustain their action.

In my view of the subject, the charge of the Judge was correct; and I do not think, that the jury have found against the weight of the evidence under the charge. On the contrary, the proof was strong to charge the plaintiffs with gross negligence on their part; although it is evident, that there was some cause of complaint, as to the situation of the rail-way, in relation to the accumulation of combustible materials under the cradle. Upon the whole view of the case, I am clear, that this action cannot be sustained, and that the motion for a new trial must, therefore, be denied.

OAKLEY J. The defendants were proprietors of a certain dry-dock or rail-way, with a machine for raising vessels out of the water, for the purpose of cleaning and repairing them. The plaintiffs hired the machine, and placed their brig Eagle upon it, under the direction of their own agents and workmen; and in the attempt to burn off the tar from her bottom, she took fire, and was much injured. They have brought this special action on the case against the defendants for damages; and they rest their right of recovery on two grounds: 1st, that the defendants had negligently suffered a quantity of combustible materials to accumulate under the machine, by means of which the fire originated and was communicated to the vessel; and 2dly, that the machine itself was insecurely and improperly constructed, so that the plaintiffs were unable to rescue the vessel from the fire, by launching her into the water.

The defence was, that the fire originated from the carelessness and negligence of the *plaintiffs*, and from their omitting to use the ordinary precautions, in such cases, against fire. The Judge charged the Jury that the defendants were not liable, if the injury arose from the negligence of the *plaintiffs* or their agents; and that they were not bound to put their machine in a state to guard against hazard, arising from the want of ordinary care, on the part of those who used it; and under this charge, the jury found a verdict for the defendants. The plaintiffs now move for a new trial, on the ground that the Judge misdirected the jury.

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Assuming that the defendants would, under any circumstances, be liable for injury, sustained by vessels, while repairing under the superintendence of their owners, I think it quite clear, upon general principles, that no action can be sustained, where the plaintiffs have been guilty of negligence in managing their own property, and have thus in fact caused the very injury, of which they complain. No man can lay the foundation of an action against another by his own wrong, or by the breach of any duty on his part. This is the dictate of common justice as well as of common sense. The defendants in the present case, to say the most, were only bound to keep their machine in a situation capable of being safely used, for the purposes for which it was intended, by those, who should manage it with ordinary care. They cannot be held to warrant the plaintiffs against the consequences of their own rashness.

In the case of *Bush v. Brainard* [1 Cowen 78] the principles above laid down are fully recognized. The Chief Justice says, "it is necessary to inquire, not only whether the defendant has "been guilty of culpable negligence on his part, but whether "the plaintiff is free from a similar charge." The cases of *Blythe v. Topham.* (Cro. James 158.) and *Butterfield v. Forrester,* (11 East. 60.) go upon the same principle.

I do not think it necessary to pursue the subject further. It seems too plain for any question.

It was contended also on the argument that the verdict was against the weight of evidence, as to the alleged negligence of the plaintiffs agents, and the cause of the fire. I think otherwise. The evidence, detailed in the case, is very strong to show gross carelessness, and even rashness on their part, and it fully warrants in my judgment the conclusion, which the jury drew from it.

Motion for a new trial denied.

[E. Anthon, Atty for the piffs. Hallett and Walker, Atty for the defts.]

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J. & W. G. WARD *versus* SELAH VAN DUZER.

In order to charge a defendant, in an action for money paid, for the purchase of stock on his account, and by his order, the plaintiff must clearly show the authority under which he acted, and prove that, he was instructed by the defendant to make the purchase. And where the proof was so defective at the trial that the jury would have been compelled to infer such authority from conversations and admissions of the defendant, which were neither explicit nor satisfactory, the plaintiffs were non-suited and the Court refused to set the non-suit aside. At the time of the purchase of the stock by the plaintiffs, the persons with whom they contracted for its delivery had no stock standing in their names on the books of the corporation by which it was issued, and there was no evidence, that they were in fact the owners of the stock, which they professed to sell. HELD, that the transaction was void under the act relative to stock-jobbing, and that the plaintiffs' action could not be sustained.

THIS was an action of assumpsit for money paid by the plaintiffs for the defendant in the purchase of stock for him and by his orders, or to recover the value of the stock which consisted of fifty shares in the Fulton Bank, of the city of New-York.

The cause was tried before Mr. Justice OAKLEY, and at the trial the plaintiffs called William J. Robinson, a stock broker, as a witness, who testified, that on the 19th of May, 1826, he sold to the plaintiffs fifty shares of stock in the Fulton Bank, at 84 per cent on its par value, for which the plaintiffs at the end of 60 days paid him the cash with interest from the date of the purchase. But at the time of the sale the witness had not a single share of the stock standing in his name, neither could he recollect whether he transferred the fifty shares to the defendant when he received his money, nor whether they were in fact transferred at all, (as he acted as a broker for other persons,) although he presumed they must have been conveyed to the plaintiffs.

The witness being cross examined, and asked, who the owner of the stock was, the counsel for the plaintiffs objected to the question, but the objection was overruled, and an exception was thereupon taken to the opinion of the Judge. The witness then testified, that he sold the stock for J. M. D. Lawrence and S. L. Gouverneur, but he knew

not whether they had any stock standing in their names, either on the 19th of May, when the sale took place, or on the 20th of July, when payment was made; nor was the witness privy to any transfer of the stock by them. He however paid over the money received of the plaintiffs to his principals, and he therefore concluded that a transfer of the shares took place. The witness testified further, that it is the common custom well known to all dealers, to transfer bank stock by means of powers of attorney authorizing the transfers, which accompany the certificates of stock, and these certificates and powers pass from hand to hand, as if they were negotiable. The witness presumed, that his principals owned the stock when he sold it, although it might have been hypothecated for some loans.

The plaintiffs then called a witness, who testified, in substance, that the defendant had admitted to him, that he had directed the plaintiffs to purchase *some* stock in the Fulton Bank, (without stating the quantity, however,) and that he had paid \$200, on account of the purchase. Another witness, (a clerk of the plaintiffs') also testified, that on the 19th of May, he heard the defendant consulting with the plaintiffs, as to the expediency of purchasing stock in the Fulton Bank. But he heard no orders for that purpose given, and all other facts known to him he derived from the plaintiffs and their books.

The cashier of the bank was then called, who testified, that neither on the 19th of May, 1826, nor on the 20th of July following, nor at any intermediate period, had Lawrence any stock standing in his name on the books of the Fulton Bank. On the 15th of July, Gouverneur had thirty-five shares standing in his name, which he afterwards, on the 22d of the same month, transferred to Robinson and another person. Robinson transferred fifteen shares, which stood in his name, but *no stock was ever transferred to the defendant*, and he never, at any time, held any stock in the bank in his own name; but the plaintiffs at all times between the periods above specified, were holders of a large number of shares.

The plaintiffs then produced a certificate of fifty shares of said stock, with a power of attorney attached thereto, and offered to

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transfer the same to the defendant, upon receiving the same amount therefor, which they had paid to Robinson.

The cause being rested upon this evidence, the defendant moved for a nonsuit, which was granted by the presiding Judge, who gave the plaintiffs leave, at the same time, to move to set it aside.

Mr. J. Hoyt, for the plaintiffs, now moved to set the nonsuit aside, and contended,

I. That there was sufficient testimony given to entitle the plaintiffs to go to the jury.

II. That as to the statute relative to sales of stock, [2 R. L. 187,] the plaintiffs were under no obligation to set it up as against Robinson, and the defendant could not avail himself of it to defeat the action. He considered the money advanced as a loan to the defendant, and, as this was not an action upon the contract, the plaintiffs were entitled to recover back the money paid out for the defendant. It was not necessary that the stock should stand in the name of the vendor;—it was sufficient if he owned it. [7 Cow. 24, *Frost v. Clarkson.*] Here the plaintiffs purchased the stock, and the defendant could have received it at any time by paying the money advanced. Whether the plaintiffs were directed to buy the stock or not, was a question for the jury, and there was evidence enough to satisfy them upon that point. At all events, the plaintiffs were entitled to an opinion of the jury upon the facts, and the nonsuit was improperly granted. [Mr. Hoyt also cited the following cases: 1 Mass. R. 139. 3 T. R. 418. 6 T. R. 61.]

Mr. Anthon for the defendant, *contra*, contended,

I. That there was no evidence to sustain the action, nor any evidence, from which the jury could legally infer the existence of a contract; and if the case had gone to the jury, and they had found for the plaintiffs, their verdict would have been set aside as against evidence. The evidence does not prove any authority on the part of the plaintiffs to purchase stock for the defendant of any

kind, and if it showed a general intention on the part of the defendant to purchase, there was still a total want of all proof as to the quantity to be procured.

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II. The contract was, at all events, void by the statute. It is proved, 1. That Robinson, the broker, had no stock at the time he pretended to sell fifty shares to the plaintiffs. 2. Neither Lawrence nor Gouverneur had any, nor was any ever transferred to the defendant. It was then a mere jobbing transaction, at least on the part of those, who sold the stock to the plaintiffs, if any in fact was sold. But it is not even proved, that any stock was ever conveyed to the plaintiffs by Robinson, and as they had a large quantity of their own, the presumption is, that the sales were all ideal, founded upon contracts to deliver stock at a future period, the sellers having none in possession at the time of the purchase, on the part of the plaintiffs.

Mr. Hoyt, in reply, said that if the plaintiffs were bound to show an express authority, they had shewn it by the testimony of the clerk, who had heard the defendant consulting with the plaintiffs as to the purchase. Add to this the fact, that the defendant paid the plaintiffs \$200 on account of the stock, and his admission of a purchase, and he thought the authority of the plaintiffs was fully made out.

OAKLEY J. I. There was no evidence of any authority by the defendant to the plaintiffs to purchase stock, of a certain character, so as to enable the jury to find any verdict in the case. The only proof on the subject was furnished by the testimony of *Willcox*, who stated that the defendant told him, that he had directed the plaintiffs to purchase *some* stock, and had paid \$200 on account. If the jury had been left to pass on this evidence, they could have found nothing. II. There was no proof, that the plaintiffs ever purchased *any* stock for the *defendant*.

None was ever transferred to the defendant on the books of the bank.

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2. The power of attorney spoken of by Robinson, (and which he merely *presumes* must have existed,) if it existed at all, is shown to have been in the hands of the plaintiffs, and they ought to have produced it. *Parol* evidence of its contents was incompetent, and there was therefore no proof at all of the pretended sale by *Robinson* to the plaintiffs.

3. There was no stock in existence, which was the pretended subject of the sale. *Robinson* had none, and *Lawrence* and *Gouverneur*, for whom he pretended to act, had none.

It is clearly, as the case stands, a void transaction, within the act relative to stock-jobbing. That act makes entirely void (2 R. L. 187, s. 18,) all contracts for the sale of the stock of any bank, unless the seller, at the time of the contract, shall be in the actual possession of the certificate of such stock, or otherwise entitled to the same in his own right, or duly authorized by some person so entitled, to transfer such certificate. If *Robinson*, therefore, or *Gouverneur* and *Lawrence*, who were the pretended sellers of the stock, were not entitled to any on the day of the sale, and were not possessed of any certificate of stock, the whole contract between the plaintiffs and *Robinson* was illegal and void. The proof shows, that neither of them at the time had any stock standing in their names in the books of the bank, and there was no evidence of any certificate of stock in the names of either. *Robinson* does not pretend to say that he had any, and he must have known the fact, if it had been so.

The affair was manifestly a mere stock-jobbing transaction, and if the proof had shewn that the plaintiffs acted on it, in pursuance of any authority from the defendant, the whole proceeding being illegal, the plaintiffs could not call on the defendant to refund them the money paid on the pretended purchase. No right of action could accrue to the plaintiffs from their own violation of the law; much less can the plaintiffs claim to have made the purchase for the defendant, when it is evident, that if he can give any authority to purchase at all, he must be presumed to have authorized a legal purchase only.

Motion to set aside nonsuit denied.

NOTE.—The Court rested their judgment on the ground, that there was no evidence to show that the defendant had authorized the purchase of the stock, so that the jury could have found a verdict on the proof as it stood.

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[Ward and Hoyt, At'tys for pliffs. W. A. Seely, At'ty for def't.]

CHARLES FARNHAM AND CALVIN POLLARD

versus

WILLIAM E. ROSS AND OTHERS.

The plaintiffs entered into a covenant with the defendants, whereby they stipulated to build and finish the Masonic Hall in the city of New-York, within a certain period, under a penalty of thirty dollars, as liquidated damages for each and every day the work should remain unfinished after the stipulated time. Held, that by the true construction of the covenant, the building was not to be finished ~~absolutely~~ within any stipulated period ; but if not completed by the time fixed, the plaintiffs were liable, for each day's delay, to the amount of the liquidated damages.

The plaintiffs completed the building within the specified time, with the exception of the front doors, and a certain stair-way. These would have been completed also, but for the defendants themselves, who made certain alterations in their plan of the stairs, and delayed the finishing of the doors. In an action upon the covenant for the contract price of the work, it was held, that this proof supported the averment of performance on the part of the plaintiffs, and that the defendants could not interpose, as a defence, a delay occasioned by their own acts. As the plaintiffs would, but for the defendants, have completed the building within the specified time, their conduct was tantamount to an averment of performance on their part, and a refusal by the defendants, which are held to be equivalent to an actual performance. 4

Covenant upon articles of agreement for building the Masonic Hall, in the city of New-York. The defendants, in their own names, but describing themselves in the body of the articles, as a "Committee of the Masonic Hall Association," entered into a contract with the plaintiffs, under seal, bearing date the 16th day

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March, 1827, whereby the latter agreed, in consideration of the sum of \$10,750, to be paid to them by the defendants at such times as might be required, in proportion as the work advanced, "at their own proper costs and charges to furnish all the materials, work, and labor necessary, or to be required for finishing the Masonic Hall," then building in Broadway, in the city of New-York, "and build the same, together with the stair-way in the rear of said Hall, and perform said work according to the specifications annexed to the agreement, "and to execute the whole according to the plans to be furnished by Hugh Reina gle," &c. Certain parts of the work were to be completed by the first of May, 1827, "and all the rest of the work," undertaken by the plaintiffs, by the first of June thereafter, under a "penalty of thirty dollars, as liquidated damages, for each and every day" the work should remain "unfinished after the day last mentioned."

The declaration counted upon the articles of agreement, and averred a general performance on the part of the plaintiffs, and that they had "built the stair-way in the rear of said Hall," and completed the whole work on the said 30th day of June, &c., setting forth the non-payment of the money, as the breach on the part of the defendants.

The defendants pleaded payment, and several special pleas, putting in issue the performance of the covenant on the part of the plaintiffs, and also that the plaintiffs were indebted to them in the sum of \$3000, "liquidated damages," for not having completed the work for one hundred days after the said first of June, and which they claimed as a set-off. They also added a notice to their plea, in which they claimed to set-off the sum of \$3000 against the demands of the plaintiffs, which sum they alleged the plaintiffs had forfeited by the non-performance of the work within the specified time.

Issues being joined upon the pleas, the cause was tried before the Chief Justice.

At the trial, it appeared that the plaintiffs had completed all their work according to the stipulations of the covenant, and with-

in the specified time, except the stairs therein referred to, and the front doors of the building, which were not finished until some time afterwards. But it also appeared that when the plaintiffs were about to build the stair-way, the defendants directed that an iron stair-way should be substituted for the wooden one described in the articles, and it was agreed that the sum of \$90 should be deducted by the plaintiffs from the amount of the contract, on account of this change. But for this, the stairs would have been completed by the time specified in the articles. With regard to the front doors, it appeared that shortly before the said first of June, the plaintiffs employed several workmen to complete the doors by that day; but Mr. Reinagle, on the part of the defendants, desired that the work on them might not be hurried, as he wished the doors to be constructed by two particular workmen. For this purpose, he applied to Brown, one of the defendants, who consented to have the doors completed by these two workmen; notwithstanding they might not thereby be completed by the stipulated time; and temporary doors were put up by the plaintiffs, to secure the building while the principal ones were in the workmen's hands.

The counsel for the defendants contended, that this testimony did not prove a performance of the covenants on the part of the plaintiffs; but the Chief Justice overruled the objection, and directed the cause to be submitted to the jury, who, after having heard the counsel for the parties, returned a verdict for the plaintiffs.

The defendants having excepted to the opinion of the presiding Judge, *Mr. Staples* in their behalf now contended.

I. That as the declaration was upon a covenant, the plaintiffs were bound to show, that they had performed it within the time, according to the terms of the covenant. This they had not done, for by their own witness it was proved, that the door and stair-way were not completed until long after the first of June. The plaintiffs could not therefore recover in this form of action.

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II. That no parol agreement could be given in evidence under the declaration to charge the time or vary the terms of the contract. [3 J. R. 528.]

III. The admissions attempted to be proved were not the admissions of all, but only of a part of the defendants.

Mr. F. Tallmadge contra, observed that the last objection, if well founded, came too late as it was not made at the trial. There was enough before the jury to show that the defendants knew of, and assented to the alterations and delays, all of which were occasioned by them, and not by the plaintiffs.

II. The defendants waived all objections as to time, and cannot therefore set it up now against the plaintiffs' right of recovery. The acts done by the plaintiffs, were tantamount to a strict performance on their part, for they would have completed their work by the time stipulated, but for the defendants.

III. The plaintiffs were not bound to finish the building by the first of June. This is not the true construction of the covenant. They might have delayed its completion for a reasonable time, but would have been liable to a penalty of \$30 per day, for every day's delay after the period stipulated. But such delay would be no breach of the covenant on their part, which would prevent them from recovering in this action.

OAKLEY J. This case comes before us on a bill of exceptions, taken by the defendants. The action is on a covenant, by which the plaintiffs stipulated, to build the Masonic Hall, in the city, and to finish it according to certain specifications, annexed to the contract and to the plans to be furnished by an agent of the defendants. Certain portions of the work were to be completed by

the first day of May, after the date of the contract ; and the whole by the 30th of June, "under a penalty of \$30, to be paid by the plaintiffs as liquidated damages, for every day, that the same should remain unfinished, after these periods respectively. By the contract a wooden stairway was to be put up in the building, and the defendants afterwards, and when the plaintiffs were about to commence the building of the stairs, directed an iron stairway to be substituted, which was not finished until after the first day of July. It also appeared that, the main door of the building was not completed, by the time specified in the contract ; but when the plaintiffs were about to employ additional workmen to finish it within the prescribed period, the defendants requested, that it might be done by two men only, with whose work they were pleased ; and that it was accordingly done by them.

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Upon this evidence, it is objected, that the plaintiffs have not shown a performance of the covenant on their part. It is well settled, that where the action is on the covenant itself, the plaintiff must show a strict performance, of the stipulations on his part, and within the time limited by his contract ; and that evidence of a parol agreement, to extend the time, cannot be given to excuse the want of such performance. [*Phillips v. Rose*, 8 J. R. 392. *Little v. Holland*, 3 J. R. 590.] It appears to me, however, that the defendants, in the present case, have mistaken the true construction of the covenant. The building in question was not to be finished absolutely within any stipulated period. If not completed by the 30th of June, certain stipulated damages, were to be paid by the plaintiffs for the delay : but the evident intent of the parties was, that the work should nevertheless be completed, under the contract. It was not necessary therefore for the plaintiffs to have averred, or proved that the house was completed by the 30th day of June. A general averment of performance on their part was sufficient ; and the proof in the case supports such an averment.

If, however, the true construction of the covenant were otherwise, I should still be of the opinion, that the plaintiffs have shown performance on their part. They were proceeding to complete both the stair-way, and the door within the time limited, when

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they were prevented from doing so by the interference of the defendants; who directed a different course of the work. This was in fact a tender of performance on the part of the plaintiffs, and a refusal by the defendants, and these are held to be equivalent to an actual performance. And it is also held, as a sound principle, that he "who prevents a thing from being done, shall not avail himself of the non-performance which he has occasioned." These principles are recognized and established, in *Fleming v. Gilbert*, (3 J. R. 631.) and are entirely applicable to the present case.

Motion for a new trial denied.

[F. A. Tallmage *atty. for the plffs.* Wm. S. Johnson, *atty for defts.*]

JOHN B. WAISTEL versus JOSEPH T. HOLMAN.

In every action for a libel, a publication of the libellous matter must be distinctly averred: and it will not be sufficient to allege, that the defendant composed, wrote, and delivered to the plaintiff a certain false, malicious, and defamatory libel, but it must appear upon the face of the declaration, that the libel was, in some form, made public. It is not necessary, however, to aver, in direct terms, that the libel was communicated to third persons, but it will be sufficient to allege, that the defendant published, and caused to be published, a certain libel, although it also appears that it was addressed to the plaintiff.

DEMURRER to the first and second counts of the plaintiff's declaration. The action was for a libel contained in a letter written, addressed, and sent by the plaintiff to the defendant; and the question was, as to the sufficiency of the publication set forth in the declaration.

The first count averred, that the defendant, on the 28th day of September, in the year 1828, at the city and county of New-York, "did compose, write, and deliver, and cause to be compos-

"ed, written, and delivered to the plaintiff a certain false, scandalous, malicious, and defamatory libel of and concerning the plaintiff, and addressed and directed to him, containing the false, scandalous, malicious, defamatory, and libellous matter following," &c., setting out the letter in *hæc verba*.

The second count alleged, that the defendant "published, and caused and procured to be published, a certain other false, scandalous, malicious, and defamatory libel, addressed to the plaintiff, and of and concerning the plaintiff, containing certain other false, scandalous, malicious, defamatory, and libellous matter, of and concerning the plaintiff, as follows," &c., setting out the letter as in the first count.

To these two counts the defendant demurred; but took issue upon the other counts in the declaration, which were for slander.

Mr. J. Anthon, for the defendant, and in support of the demur-rer, contended, that as the first count set forth a letter in *hæc verba*, written and sent by the defendant to the plaintiff, a publication of it to a third person should have been averred, in order to make it libellous. The gist of the action is injury done to the character of the plaintiff in the estimation of others, and this could never come but from publication. To write and deliver a letter to the person himself, who is libelled, is no publication, for he may keep it entirely secret. The defendant does not put the defama-tory matter into circulation, and of course does not injure the plaintiff in the estimation of others. As there can be no libel without a publication of it to others, besides the plaintiff, the pub-lication should be averred, and the want of such an averment is a fatal defect in the declaration. [*Lyle v. Clason*, 1 Caines' R. 580.]

The second count is substantially like the first, and as it also sets out the subject matter in *hæc verba*, the Court will judicially understand, that the supposed libel is a letter addressed by the defendant to the plaintiff. The publication of this letter should then be distinctly averred, and it is not sufficient to state in gene-ral terms, that the defendant "published, and caused it to be pub-lished." The reason is, that from the averments taken to-gether, it appears the publication was made merely by sending the

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letter to the plaintiff. This is not a sufficient averment ; it must appear that the libel was communicated to a third person ; and the Court cannot infer, that it was so communicated. These defects are apparent, and may be taken advantage of by general demurrer.

Mr. O'Conner for the plaintiff, *contra*, contended, that as the words set out were actionable in themselves, it was not material to aver a publication of them to a third person, by any technical words. If the words used in the libel are such as tend to injure, degrade, and disgrace the plaintiff, the libel is consummated when the letter containing it is delivered to the plaintiff himself. He is thereby in some measure constrained, in self-vindication, to communicate it to his friends, and the law will deem the libel published, if delivered to the plaintiff himself. [To show that the words used in the letter were actionable *per se*, and that the alleged publication was sufficiently averred, Mr. O'Conner cited *Brooks v. Bemis*, 8. *John. R.* 456. 10. *Ib.* 444. 5. *Co. R.* 125.]

The second count avers a publication in direct, unequivocal, and technical terms. It was not necessary to allege a publication to "third persons," nor can any such averment be found in the precedents. The libel is not called a letter, nor will the Court infer, that it was in fact a letter, because it was such in form. If it were termed a letter in the count, the inference might be that it was a *sealed* letter. But here this libel might have been exhibited to many persons before its delivery, and the plaintiff expects to prove, that the fact was so.

OAKLEY J. In *Lyle v. Clason*, (1 *Caines' R.* 581,) the Supreme Court decided, that in every action for a libel, a publication of the libellous matter must be averred, that the sending of a sealed letter by the defendant to the plaintiff, is not a publication of the libel, and that any letter sent is to be presumed to have been sealed. The principle of that case is, that when the declaration shows a publication of the libel to the plaintiff only, the action cannot be sustained. The Court say, that the "basis of the action is damages for the injury to the character, in the opinion of

"others," and that can only arise from publications to third persons. In the present case, the declaration alleges that the defendant composed, wrote, and delivered to the plaintiff, a certain libel, &c., addressed and directed to the plaintiff, &c. This averment does not show a publication of the libel. The plaintiff could not have sustained any injury by it, unless he communicated its contents to others, and of course had no right to sustain this action for damages. The first count falls clearly within the case of *Lyle v. Clason*, and the demurrer to it is well taken.

The second count sets forth, that the defendant "did publish" "and cause and procure to be published," a certain other libel, "addressed to the plaintiff." Here is a sufficient publication averred. Although it may be inferred, that the libel was in the form of a letter, addressed by the defendant to the plaintiff, yet, the publication may have been, by showing it to other persons, or even by inserting it in a newspaper. The particular mode of publication need not be set forth. The demurrer to the second count must, therefore, be overruled.

Judgment for the defendant on the demurrer to the 1st count, and for the plaintiff on the demurrer to the 2d count, with liberty to either party to amend.

[C. O'Conner, Atty for the plff. E. Anthon, Atty for the deft.]

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1829.

Waistel
v.
Holman.

Jane Term,
1829.

Baldwin and
Forbes
ads.
Mildeberger.

SIMEON BALDWIN & HORACE D. FORBES,

ads.

JOHN MILDEBERGER.

A factor, who has made advances for his principal, although he has a general lien on the goods and the proceeds of the goods of his principal in his hands, as a security for his advances, is nevertheless a competent witness for his principal, unless he has a specific claim upon the subject matter of the controversy.

Where there is a mutual misunderstanding between the vendor and purchaser as to the terms of a sale, neither party is bound by the supposed agreement, there being, in such a case, no assent to the contract.

The plaintiff's factor sold goods to the defendants, to be paid for, as he understood the arrangement, in the note of a third person payable at a future day, endorsed by the defendants; but as the defendants supposed, by the same note, endorsed without recourse to them. The goods being delivered, the defendants offered the note proposed to the factor, endorsed without recourse, which he refused to receive. The defendants kept the goods, and declined to make payment in any thing, but the note thus offered, and thereupon this action was brought to recover the value of the goods. The judge charged the jury, that if there was a mistake between the parties in the first concoction of the contract, the one expecting to receive a note endorsed by the defendants, absolutely and the other to give it without recourse to them, as the defendants instead of returning the goods had appropriated them to their own use, they were bound to pay for them. A verdict having been found for the plaintiffs, this charge was held to be correct, and the factor was held to be a competent witness for the plaintiff.

Assumpsit for goods sold and delivered. The defendants pleaded, 1. The general issue. 2. Payment. 3. That the goods mentioned in the declaration were sold by the plaintiff on an agreement to accept in payment therefor, to the extent of six hundred and thirty-eight dollars, a promissory note for that sum, drawn by S. Penny & Sons, in favour of the defendant, bearing date the 8th day of April, 1828, payable four months after date, endorsed by the defendant without recourse, and the balance in cash. That the defendants had, according to their agreement, tendered the note and the cash, which the plaintiff refused.

Upon the second plea the plaintiff joined issue and to the third replied, admitting the tender of the money and note, but wav-

ing the facts of the agreement, relative to the terms of the sale as set out in the plea.

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The cause was tried before the Chief Justice. At the trial, the plaintiff called one Hervey Brown as a witness, who being sworn on his *voir dire*, stated, that he was a commission merchant, and that as the plaintiff's factor he sold the merchandise in question to the defendants. That he had made advances to the plaintiff, *but not on the goods in controversy*. That the plaintiff was then indebted to him to the extent of \$150, and was abundantly able to pay that debt. The witness further stated, that if there was a recovery in this case, he supposed he should be paid out of it, but the plaintiff was under no obligation to do so. The witness had no claim whatsoever on the specific proceeds of suit, nor had he any interest in the result.

Upon this statement, the council for the defendants objected to the witness, as being interested and incompetent; but the Chief Justice overruled the objection. Being sworn in chief the witness testified, that there had been a good deal of negotiation between the defendants and himself in the month of April 1828, relative to the purchase of the merchandise in question, (several hundred boxes of soap) before the sale took place; during which, the quantity, price and time of credit were adjusted and fixed. The credit was to be for six months and when the witness went to the defendants to complete the sale, something was said to him, by the defendants, relative to a note of S. Penny & Sons, which the defendants wished him to take in part payment. To this proposition the witness replied, that he did not know the standing of the makers, and the defendant Baldwin said, that "the note was good and *he would endorse it.*" The witness being satisfied with this, *delivered the soap accordingly*, on or about the 30th of April 1828. Afterwards the witness called upon the defendants for a settlement of the matter and a calculation was made as to the amount due for the soap, an allowance being made for the difference between the credit of six months, and the time when the note would fall due. As the note did not amount to as much as the bill of the merchandise, there was a balance due to the plaintiff in cash, and for this balance, Baldwin wrote a receipt in his

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receipt book and handed it to the witness to for his signature. The witness then demanded the note, which was handed to him *unendorsed*, and this circumstance being mentioned to the defendant Baldwin, he tood back the note and asked *how* it should be endorsed. The witness replied, that he merely wanted the names of the defendants upon it ; whereupon Baldwin endorsed the note in the name of the defendants in these words, “*pay without recourse to us*,” and handed it back to the witness, who refused to receive it, remarking, that he had not sold the goods for such paper. Baldwin replied, that he had, and that he would give no other. The witness then again refused to receive the note, and told the defendants, that he would allow the matter to rest until the period of credit elapsed. In the mean time, on the first of July, 1828, Penny & Sons failed, but it did not appear that the defendants had ever returned the soap or that they had offered to return it. The note referred to was the same described in the third plea of the defendants.

The defendants on their part called two witnesses, from whose testimony, it appeared, that when Brown offered the soap to the defendants they were willing to purchase it, *provided* he would receive the paper of Penny & Sons, in payment therefor. That Brown at the time, postponed the giving of a definitive answer for the purpose of ascertaining the credit of the makers of the note ; but afterwards called upon the defendants and told them that they could have the soap. It was accordingly delivered, and when Brown called for a settlement, the defendants gave him the note of Penny and sons, endorsed *Without recourse*. But he refused to receive it endorsed in this form and the defendants declined giving any other. Baldwin stated to Brown, that it could not be, that the defendants were to endorse the note, because that would make the bargain more favourable for the plaintiff than the one proposed by him. The time of credit was to be six months upon the security of the defendants alone ; whereas by the terms now demanded, the plaintiffs would have the security of Penny & Sons *together with* that of the defendants, and this at a credit of only *three* months, as the note would be due at the expiration of that time.

Upon this evidence the Chief Justice charged the Jury, that if they found the agreement between the plaintiff and the defendants was, that the defendants should endorse the note of Penny & Sons *absolutely*, then their verdict should be for the plaintiffs. 2. If however there was a *mistake* between the parties, in the first concoction of the contract, the one *expecting to receive the endorsement absolutely* and the other to give it *without recourse*, that then as the defendants, instead of returning the article sold, had used it, they were of course bound to pay for it.

3. If the jury found, that it was expressly agreed, that the plaintiffs was to receive the note of Penny & Sons, endorsed without recourse, and take the risk of it, that then their verdict should be for the *defendants*.

The jury returned to the bar with a verdict for the *plaintiffs*, but upon the suggestion of the counsel for the defendant, and with the assent of the plaintiffs' counsel, they were directed by the Court to state, upon what ground they founded their verdict. The jury replied, that they founded their verdict upon the belief, that there had been a mutual misunderstanding between the parties, as to the terms of the bargain at the time of the sale.

The verdict was for the full amount of the goods at the price stated by the plaintiffs' witness.

Mr. D. Lord, for the defendants, now moved for a new trial, and contended,

I. That Brown was interested in the recovery, having legally a lien upon the fund sought to be recovered, and was therefore incompetent as a witness. [Paley on Agency, 108, 9, 10. Payton v. Hallet, 1 Caines' Rep. 364, 379. Drinkwater v. Goodwin, Coup. R. 251.]

II. A party to a contract cannot allege that it is void, because the terms of it were not understood, there being no misrepresentation or mistake as to any supposed facts; and in this respect, the charge was erroneous. The real question arose from a conflict of testimony, and if the jury believed the witnesses of the defend-

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ants, their verdict ought to have been in their favour. There is no case where misapprehension merely will avoid a contract,—there being neither mistake, nor ignorance of facts, nor misrepresentation. [1 Pow. on Con. 140. 2 Ib. 196. Newland on Con. 342, 432.]

The rule laid down in the charge is loose and dangerous, as it opens a door for *pretended* misunderstandings, which cannot be detected. At the common law this principle is carried so far, that a man may not set up his own insanity, much less his own misapprehension. [1 Pow. on Con. 14.] If misapprehension is to avoid a contract, then inquiry must be made as to the capacity and intelligence of the contracting parties, and the rule laid down is in practice impracticable.

But if this is a case of *mutual* mistake, why should all the consequences of it fall on the defendant? The rule of equity would be to divide the hazard; but this would violate the contract, and destroy every thing like the practical rules known to the law.

III. Neither party did, in the present case, by evidence, attempt to show any such misunderstanding, nor was there any evidence thereof; but on the contrary, *the agreement was clearly made out, according to the allegations of each party, by their respective witnesses;* and therefore, even if the law were, as was charged by the Court, the present was not a case for its application, and the Judge erred in directing the jury to apply it to this case.

IV. The verdict, finding that the parties misunderstood the terms of the bargain, was contrary to the evidence of all the witnesses on both sides.

*Mr. Anthon, contra.*

I. The contract of sale was complete as to quantity, price, and credit, on the 30th of April, 1828, and had no reference, at that time, to the proposition relative to the note of Penny & Sons. That was a subsequent proposition, and the defendants originally intended, and expected to pay for the merchandise. They have

received the goods, and have appropriated them to their own use; and the plaintiff having awaited until the expiration of the credit originally agreed upon, was entitled to recover, unless the defendants could prove, that the plaintiff agreed to take Penny's note in payment. This question was put to the jury in the fairest manner by the Chief Justice at the trial, and the jury were of opinion, that no such agreement existed. Their verdict was in strict accordance with the proof, for Brown testified, that he never intended to take the note of Penny & Sons in payment, and he refused to take it. At this point of time, the defendants might have rescinded the contract, and by returning the soap, might have put the parties into their original situation. This they neglected to do, and having received the benefit of the plaintiffs' property, they are bound to pay for it.

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II. If the parties misunderstood each other, relative to the conditions upon which the note was to be received, then there was no *contract* upon this head, and the original sale, at a credit of six months, remained according to the original stipulation of the parties, and the defendants, not having rescinded the contract, by returning the goods, are responsible for the stipulated price, according to such original contract.

A contract is defined to be "*aggregatio mentium*," but in relation to this note, the minds of the parties did not meet, and therefore there was no binding agreement upon this point. There was no mutual assent, and neither party was held to that to which he never intended to agree.

The risk and hardship did not rest upon the defendants alone, but the plaintiff has his risk also. If Penny & Sons had remained solvent, and the defendants had failed, then the latter would have received the amount of the note, and the plaintiff would have lost the value of his goods. The risk, then, was mutual, and perhaps equal, and there can be no complaint upon this score. [In relation to this head, Mr. Anthon cited 2 *Black.* Com. 442. 1 *Chit. on Con.* 4. 13 *Ves.* 427. 1 *Wheat. R.* 444. 5 *East. 16.* 8 *Mass. R.* 178.]

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III. The question as to the misunderstanding of the parties was fairly left to the jury, and their verdict is tantamount to a finding, that there was no contract with regard to the note of Penny & Sons. If the parties misunderstood each other, there could be no *agreement*, and the charge was strictly correct on all points.

IV. Brown was an admissible witness, for he was not interested in the *fund*. He had a mere general lien, and a factor is always competent to testify for his principal.

HOFFMAN J. According to my understanding of the charge, the Judge did not submit to the jury any thing relating to the legal effect of the contract. He merely charged them, that if there was a mutual mistake between the parties, as to the terms, upon which the note of Penny & Sons was to be received, then that the agreement was not binding as to the note, and that the plaintiff might recover upon the original cause of action. Taking the whole charge together, and it is evident that nothing but *facts* were put to the jury, and their finding appears to be consistent with the evidence.

A contract resting in *parol* cannot be binding upon the parties, if they do not understand the terms of it alike, for in such case there is evidently no agreement. If the terms, however, are once fixed, neither party can recede, upon the ground, that he mistook the effect of the terms. Here it seems, that the plaintiff's agent supposed, that the goods were to be sold for an endorsed note,—the defendants, that they were to give the note of a third person, either without endorsement, or endorsed without recourse to them. The facts are not agreed upon between the parties, and as their understanding relative to the notes was different, there was no contract, which could bind either of them.

The defendants were aware of this discrepancy before the goods were disposed of; and if they were not content to take the hazard of this doubtful state of things, they might have rescinded the contract without prejudice to themselves or the plaintiff. They did not take this course, which common prudence pointed out, but

chose to rest sternly on their legal rights according to facts, which they expected to prove. If there be default any where, the defendants are most obnoxious to that charge and by appropriating the goods to their own use they are clearly liable in my judgment for their value.

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The objection to the evidence of Brown is not well founded and perhaps it originated in a misconception. There was no appropriation of any specific fund to the use of the witness, nor had he any special claim upon the proceeds of the goods sold. Brown was the mere agent or factor of the plaintiff, and although as such he would have a general lien upon goods or the proceeds of goods in his hands belonging to the plaintiff, as a security for his advances, yet an interest of this kind never disqualifies a witness. Upon principles of policy, of convenience and necessity the agent is admitted as a witness for his principal, and there is nothing in this case to make an exception to the general rule. The witness had no specific interest in the subject matter of the controversy and he could not gain or lose by the event.

Upon the whole, I look upon the charge of the Chief Justice as substantially correct in all its parts and he was also correct in permitting Brown to testify.

OAKLEY J. 1. The objection to the competency of the plaintiff's witness, *Brown*, was not well taken. He was the factor of the plaintiff and as such, had a general lien, for a balance due him, on the property of the plaintiff in his hands, but no specific claim for the payment of that balance on the proceeds of the goods sold to the defendants. It has never been held, that a factor, or commission merchant, is an incompetent witness, on the ground of interest, because he has a general lien on the proceeds of the sale of the goods of his principal. It is not such an interest in the event of the suit, as ought to disqualify him. In the case of *Payton v. Hallet*, (1 *Caines' R.* 364.) the witness, objected to, had an order from the plaintiff or his agent to be paid out of the particular fund in controversy, and declared, that he expected to be paid out of that fund. The Court considered that such order amounted to an assignment of the fund *pro tanto*, to the witness. That case, therefore, differs from the present.

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2. It is objected, in the second place, that the Judge erred in charging the jury, that if they found, that the parties laboured, under a mutual mistake, in the formation of the contract, they ought to find a verdict for the plaintiff.

The distinction between a mistake of a party to a contract, as to matter of fact, and a misapprehension as to matter of law, is well settled. The latter can never be alleged, to rescind a contract; the former may be. Taking the charge of the Judge, in connection with the special finding of the jury, which is stated in the case, to have been by the consent of the parties, I consider the direction given to the jury to have been, that they were to determine, whether the parties to this contract, misunderstood each other, as to *its terms*. In that light the direction was clearly correct.

If there was a mutual misunderstanding, at the time of the sale, as to the fact whether the note of *Penny & Sons*, was to be endorsed absolutely, or upon condition that the endorser was not to be liable on the endorsement, there clearly was no agreement between the parties. The defendants were bound to prove affirmatively, that the agent of the plaintiff agreed to accept the note, in payment without the security of the endorsers, and failing to do that they are bound to pay for the goods, as they did not return them to the seller, on the discovery of the misapprehension of the bargain.

*Motion for a new trial denied.*

[Hallett & Walker *atty's for plff.* D. Lord *atty for defls.*]

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JAMES HALL AND JACOB G. MONTROSS

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Montross  
v.  
Constant

versus

*C*  
LEWIS CONSTANT.

The payment of a part of a debt due is no consideration to support a promise to give further time for the payment of the balance.

An agreement for delay, without consideration, made between the principal debtor and his creditor, will not discharge a surety. An agreement to have that effect must be a binding agreement, or one to the prejudice of the surety.

A negotiation for delay upon terms not finally accepted, does not discharge the surety, though there is actual delay; there being no binding contract to prevent a suit against the principal at any time.

A debtor who pays money to his creditor, being liable to him upon more accounts than one, has a right to direct the application of the payment to whichever subject he may choose: and where the jury neglected or refused to follow this rule, the Court granted a new trial.

THE declaration in this case was upon a promissory note for \$404.90, bearing date the 6th of Nov. 1826, drawn by a certain firm bearing the name of Haight & Carpenter, in favour of the defendant, and endorsed by him to the plaintiffs, payable sixty days after date. The common money counts were also added to that upon the note. The defendants pleaded the general issue, and payment, and gave notice of a set-off.

The cause was tried before Mr. Justice HOFFMAN; and at the trial the plaintiffs proved the making of the note, a demand when due and regular notice to the defendant, the endorser.

The defendant on his part then called Haight, one of the makers, as a witness,—who, having produced a full discharge from the defendant, testified that the note in question was drawn and endorsed for the accommodation of his firm. That when the note became due, he called upon the plaintiffs to obtain time for its payment, but had with him a sum sufficient to take it up. That the said firm were also, at that period, still further indebted to the plaintiffs upon another note for \$368.94, payable directly to the plaintiffs on demand. That the plaintiffs were willing, on

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receiving \$200, on account of their claims and notes for the balance, to give time for the payment of *both* demands, to the extent of three and six months. With reference to the notes to be given, they were to be drawn by the defendant alone, (the plaintiffs having some objection to Carpenter;) and to have *good endorsers*. The witness proposed the *defendant*, but the plaintiffs replied, "they had him already." It was finally arranged, that the witness should give his own notes, with such endorsers as should be satisfactory to one William Nelson. Upon this arrangement, the witness paid the plaintiffs two hundred dollars, to be applied on the note endorsed by the defendant; and it was so understood by him at the time. The plaintiffs, thereupon, gave the witness a receipt in the following words—"Received, New-York, 15th January, 1827, from Wm. Haight two hundred dollars, endorsed on Haight & Carpenter's note. (Signed) James Hall & Co."

The witness supposed that the receipt referred to the note endorsed by the defendant; but at the trial it appeared that the money had been endorsed on the *other* note for \$368.94.

After this arrangement was made, Carpenter told Haight that he would not gratify the plaintiffs by procuring endorsers upon the new notes: and thereupon the individual notes of the witness were drawn and enclosed to the plaintiffs, *as he believed*. The witness did not, however, enclose nor forward them himself, and he knew not whether they had ever been received by the plaintiffs as they never made any admissions upon the subject. The witness, however, saw his partner writing to the plaintiffs and supposed, that he enclosed the notes.

When the above arrangement was made and the money paid, there was a general statement made by the witness, and handed to the plaintiffs, embracing both notes then due, with the interest thereon, and carrying the notes into one account.

Upon this evidence the Judge charged the jury that if an extension of the original credit was actually made by an agreement between the plaintiffs and the drawers of the note, (without the participation, knowledge or assent of the endorser, for a good and valuable consideration,) such an agreement

would discharge the endorser from his liability. The jury were to determine whether the agreement as stated by the witness, had been *complied with by the drawers*; and that, if it was in fact made and completed, then there was a sufficient consideration to support it.

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If the two hundred dollars were paid upon the note in question, the Judge further charged the jury, that the defendant was entitled to the benefit of that payment; but if it was carried into the statement, as a general credit on the whole claim embracing both notes, then the defendant was at least entitled to the benefit of a *pro rata* portion of it, to be applied to the note endorsed by him.

To this charge, the counsel for the *plaintiffs* excepted, upon the ground, that there was no consideration for the agreement, and that the payment could not be apportioned in favour of the defendant. The jury, however, gave a verdict in favour of the plaintiff for \$465.87, being the whole amount of his claim. It was then agreed between the parties, that the facts should be stated in the form of case, which each party had the right of turning into a bill of exceptions.

The defendant now moved for a new trial, and Mr. *Seely* in his behalf contended,

I. That the verdict was against law and evidence. The giving of time to the drawers discharged the endorser. [He cited *Chit. on Bills*, 290. *Sel. N. P.* 272. 1 *T. R.* 169. 3 *Bos. and Pul.* 61. 3 *Ib.* 365. 8 *East.* 576. 13 *Ib.* 177.]

II. The damages were excessive. The defendant was entitled to the benefit of the two hundred dollars, which were paid, as the witness expressly swore, on the note in question.

III. The verdict was against the charge of the Court, which instructed the jury at all events, to allow a portion of the payment for the benefit of the defendant.

*Mr. P. A. Cowdry, contra*, for the plaintiffs, contended,

I. That the endorser of a promissory note is discharged by the giving of time to the drawer, in those cases only, where the credit is extended by an express agreement, which is binding in law

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1899. upon the parties. [12 Wheat. R. 556. Chit. on Bills, 296. 3  
*Price's R.* 582.]

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II. No consideration was proved, that would have supported such an agreement. [12 J. R. 426.]

III. Whether any agreement was made by the plaintiffs with the drawers of the note declared on, extending the time of payment, was a question of fact for the jury to determine.

IV. Where a debtor pays money to his creditor, who has demands against him on two accounts, the creditor may place the payment to which account he pleases, unless the debtor directs its application.

V. What the understanding between the parties was, in relation to the credit of the payment of the two hundred dollars, was also a question of fact for the jury to determine.

*Per Curiam.* It is well settled, that the payment of a part of a debt due is no consideration to support a promise to give further time for the payment of the balance. [Peabody v. Knox, 12 J. R. 426.] And it has also been decided, that an agreement for delay, without consideration made between the principal debtor and his creditor, does not discharge the surety. An agreement to have that effect, must be a *binding agreement*, or one to the *prejudice of the surety*. [12 Wheat. R. 556, McLoman v. Penell.] So also a *negotiation for delay*, upon terms not finally accepted, does not discharge the surety, though there is actual delay, there being no binding contract to prevent a suit against the principal at any time. [3 Pri. Ex. Rep. 521, Badnall v. Samuel.]

In this case, the court does not perceive any such binding agreement, nor that the endorser was in any way prejudiced. The general foundation of the action is therefore well laid, and the plaintiffs are entitled, at all events, to a verdict.

There is another question, however, as to the amount to be recovered, which is certainly in favour of the defendant. It is a

familiar principle, that a debtor, who pays money to his creditor, being liable to him upon more accounts than one, has a right to direct the application of the payment to whichsoever subject he may choose. If he neglect to do this, the creditor may direct the application, and in the absence of any appropriation by either of the parties, the payments will either be applied to the claims first due, or in such way as to do justice between the parties.

In this case it is clear, that the debtor did apply the payment of the two hundred dollars either to the note in question, or that he paid it on the general account of both notes. Upon this point, the Judge's charge was perfectly correct, and the jury have found against the charge and the law. There must, therefore, be a new trial, to reduce the amount of the verdict. At the new trial, the jury must apply either the whole payment to the defendant's note, or they must give him credit for such a relative proportion as the payment bears to the endorsed note, according as they shall find, that the payment was in fact made on this specific note, or on the general account of both. It is very evident, that the makers never intended to apply the whole payment to the note, which was not endorsed, nor could it have been so understood by the plaintiffs at the time. The payment was not made generally without any appropriation, and the jury must therefore say to what subject it was applied.

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*New trial granted.*

[P. A. Cowdry, Atty for plffs. W. A. Seely, Atty for deft.]

Vide p. *Wendell's Rep.*

## CASES IN THE SUPERIOR COURT OF

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1829.

Delavan and  
Delavan  
v.  
Stanton and  
Wilbur.

HENRY W. DELAVAN AND EDWARD C. DELAVAN

*versus*

DANIEL STANTON AND JOHN B. WILBUR.

A plea of an insolvent's discharge, cannot be joined with a plea of *nul tiel record* : but the misjoinder can only be taken advantage of by special demurrer, or by motion.

If a party plead a *judgment*, he must shew the certainty of it, setting forth the parties, and the court in which it was obtained. And the plea of an insolvent's discharge ought to set forth the *action*, in which the debtor was imprisoned, the *court* out of which the execution was issued, and the *name* of the creditor upon whose application the proceeding was instituted.

A defect in the averments of a plea, as to these particulars, is matter of substance, and may be taken advantage of by a general demurrer.

THIS was an action of debt upon a judgment obtained by the plaintiffs and one Thomas Gould, (since deceased,) against the defendant, in the Supreme Court of this State, at the August Term of that Court, in the year 1817. The defendant Stanton appeared, and pleaded, 1. *Nul tiel record*. 2. "That after the said supposed recovery, in the said plaintiffs' declaration mentioned, and before the commencement of this suit, the said defendant, then being an inhabitant of the said City and County of New-York, was a prisoner in the jail of the City and County of New-York, upon execution issued against him in a civil action, and actually imprisoned in the said gaol, on the said execution, for sixty days, then last past and upwards; and being so imprisoned, as aforesaid, application was made to Richard Riker, Esq., then being recorder of the City of New-York, at the said City of New-York, by one of the creditors of the said defendant, Daniel Stanton, then an insolvent debtor, praying for the relief afforded in and by the act of the Legislature of the State of New-York, entitled "an act for giving relief in cases of insolvency, passed the 12th day of April, 1817," under an apprehension that the estate or effects of the said Daniel Stanton would be wasted and

embezzled ; and that upon such application, the said creditor did make affidavit according to law, that the said insolvent was justly indebted to him, in a certain sum of money, then due and specified in said affidavit, and not less than \$25 ; and that the said insolvent was then in prison on execution issued against him in some civil action, and that he had been so imprisoned for sixty days and upwards. And such proceedings were thereupon had before the said Richard Riker, being such Recorder as aforesaid, that the said Richard Riker, being such Recorder as aforesaid, afterwards, to wit, at the said City of New-York, on the 27th day of April, A. D. 1818, and in pursuance of the aforesaid act, by virtue of the power and authority in him vested, in and by the said act, did make and execute a certain discharge in writing, under his hand and seal, in the words following, to wit." [Here followed the discharge, which was in the common form, and was set out verbatim.]

Upon the first plea, the plaintiffs joined issue : to the second, they demurred *generally*, and the defendants joined in the demurrer.

*Mr. Daniel B. Tallmadge* for the plaintiffs, in support of the demurrer, contended,

I. That the plea of an insolvent's discharge could not be joined with a plea of *nul tiel record*. [*Lecompte v. Pendleton*, J. Cas. 104.] They require different trials, and of course cannot be joined. It may, however, be, that this defect should be taken advantage of by motion, instead of a general demurrer.

II. The plea does not set forth the facts, which give the Recorder jurisdiction, with sufficient certainty to enable the plaintiffs to form an issue upon them. The plea should set forth the *particular execution* on which the defendant was imprisoned, and the *court* out of which it was issued should be described. The *creditor*, also, who made application, should be specified, for the Recorder has no jurisdiction unless a creditor applies. The plaintiffs then would have the opportunity of showing, that the person

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June Term, 1829. applying was not a creditor. [4 Vol. L. N. Y. 43 b. 1 J. R. 91. 7 Ib. 75. 1 Cowen's R. 316. 3 Ib. 206. 6 Ib. 224. 10 J. R. 161. 11 Ib. 224. 2 Salk. 517. Com. Dig. Pleader, 2 W. 12. *Laws on Ass.* 669-70. 11 East. 516. 1 Wend. R. 209.]

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Mr. R. Sedgwick, contra, contended that these objections, if correct in any point of view, could only be taken on special demurrer. [7 Cow. R. 442.] The misjoinder of the pleas is clearly the subject of special demurrer only, or of motion, and cannot be objected to now.

If this plea be bad, then all others of the kind are bad also, for they are all alike, and are taken from one common form, which all pleaders in this city use. But there is enough shown to give the Recorder jurisdiction, and the name of the creditor cannot be necessary for any such purpose. The statute is general in its expressions, and the plea conforms to the words of the act. This is all that can be required, and these objections would not avail, even on special demurrer.

OAKLEY J. This is an action of debt on a judgment, obtained in the Supreme Court of August Term, 1817. The defendant, Stanton, pleads, 1st. *Nul tiel record;* 2d. A discharge under the insolvent act, dated the 27th of April, 1818. On the last plea there is a general demurrer.

It is clear that these pleas are improperly joined; but that objection cannot be taken on this demurrer. The plaintiffs should have demurred to both pleas for that cause, or they might have called upon the defendants to strike one of them from the record. The only inquiry here is, as to the sufficiency of the second plea.

The discharge in question is alleged to be by virtue of the act, entitled "an act to amend an act, entitled an act, for giving relief in cases of insolvency," passed February 28, 1817, (p. 40, ch. 55,) and the objection to the plea is, that it does not set forth the facts necessary to give the officer, granting the discharge, jurisdiction.

The rule of law, on this subject, is that the plea must show affirmatively, that the officer granting a discharge under the insol-

vent act, had jurisdiction in the case. Every fact necessary to give such jurisdiction must be averred, and the want of any necessary averment, cannot be supplied by the recitals in the discharge itself. [*Wyman v. Mitchell*, 1 Cowen's R. 318. *Morgan v. Dyer*, 10 J. R. 161.]

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The act in question provides, that when any person has been "actually imprisoned for sixty days, upon execution in any civil suit," any creditor of such person may apply for relief, &c.; and "upon such application, and an affidavit being made by such creditor, that such person is justly indebted to such creditor in a sum of money then due, to be specified in such affidavit, and not less than twenty-five dollars, and that such person has been imprisoned, &c., the officer to whom such application is made, shall order," &c.

The plea in question avers, 1st. That the defendant was an inhabitant of the City of New-York, and had been actually imprisoned in said city, "upon execution issued against him in a civil action." 2d. That application was made to the Recorder in said city, "*by one of the creditors of the said Daniel Stanton*," praying relief, &c. 3d. That upon such application, said creditor made affidavit, that said insolvent was indebted to him, "in a certain sum of money, then due and specified in said affidavit, and not less than twenty-five dollars, and that he was then in prison, &c., and had been so for sixty days and upwards. The plea then avers, that such proceedings were had in the case, that the said Recorder afterwards granted the discharge, which is set forth in *hac verba*.

It is objected, that the plea does not set forth, the name of the creditor applying for relief, &c., nor the particular execution, on which the debtor was imprisoned, nor yet the court out of which it issued. If these averments are necessary, they are, of course, traversable, and should be pleaded with such particularity as to enable the plaintiffs to take issue on them. If a party plead a judgment, he must show the certainty of it, and set forth the parties, and the court in which it was obtained. (*Com. Dig. Pleader*, 2 W. 12.) And the same rule applies to the case of pleading a writ. (*Gray v. Hart*, 2 Salk. 517. *Patton v. Foote*, 1

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*Wend. R. 209.*) The plea in the present case, ought to set forth the action, in which the debtor was imprisoned, and the court out of which the execution issued, and also the name of the creditor, upon whose application the proceeding was instituted. The plea is clearly bad, but the doubt has been, whether the defect could be taken advantage of on a general demurrer. Upon considering the cases, and particularly that of *Gray v. Hart*, (as reported in 2 *Lut.* 1458,) I am of opinion, that the defect in the averments in the plea, is matter of substance. In the case of *Gray v. Hart*, the action was for an assault. The defendant justified on the ground that he had arrested the plaintiff by virtue of a *certain writ*, without setting forth the court out of which it issued. The plaintiff replied, and there was a special demurrer to the replication. The court, in giving judgment, considered the *plea* as bad, because it did not show out of what court the writ issued; and it is well settled, that no defect in any plea, preceding that to which the demurrer is taken, can be noticed, except it be such as would be bad on general demurrer. The averment, therefore, in that case, must have been considered substantially defective, and the principle of it, is certainly applicable to the case now before us.

*Judgment for the plaintiffs.*

[E. Curtis, Atty. for the *pliffs.* D. D. Field, Atty. for the *defts.*]

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## THE FARMERS AND MECHANICS' BANK

versus

The Farmers'  
& Mechanics'  
Bank  
v.  
Rayner.

JOHN RAYNER.

A plea of *not a corporation*, is bad upon special demurrer, as amounting to the general issue: for whatever the plaintiff is bound, in the first instance, to prove, in order to support his cause of action, cannot be specially pleaded by the defendant. And this principle applies as well to *foreign corporations*, as to our own.

**ASSUMPSIT** brought by the plaintiffs, as the endorsees, against the defendant as endorser of three several promissory notes, drawn by one William S. Rayner.

The defendant pleaded, I. The general issue; and II. That the plaintiffs were not "a body politic or corporate, and had not a right, by the laws of the land, to sue as such."

To this last plea the plaintiffs demurred specially, and set forth for cause, that it amounted to the general issue.

*Mr. J. Hoyt* for the plaintiffs, and in support of the demurrer, contended, I. That any matter of defence which denies what the plaintiff is bound to prove, or be non-suited, in the first instance, on the general issue, ought not to be pleaded specially. [*Bank of Auburn v. Weed and others*, 19 John. R. 300.]

II. That a corporation when plaintiff is bound to prove itself such on the trial, or be non-suited. [14 John. Rep. 238. 8 Ib. 378.]

*Mr. A. S. Garr* for the defendant, *contra*, contended that the plea was good; but if bad, the defendant was entitled to judgment, because the declaration was defective. That the plaintiffs were a *foreign corporation*, and the declaration should therefore have set forth where and by what authority they were incorporated. There was nothing in any part of the pleadings to show, that the bank was a *foreign corporation*, and the declaration commen-

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ed in the usual form: "The Farmers and Mechanic's Bank, "plaintiffs in this suit," complain, &c. He referred to the case of *The Auburn Bank v. Aiken*, (18 J. R. 137.) and the authorities there cited. *Childress v. Emory*, (8 Wheat. Rep. 643.) *D'Wolf v. Rabaud et al.* (1 Peter's S. C. Rep. 498.) 1 Chitty's Plead. 255. *Rev. Stat. part 3, chap. 8, tit. 4. art. 1. sec. 3. 13.*

OAKLEY J. The case of the *Bank of Auburn v. Weed*, (19 J. R. 300.) decides the point raised on this demurrer. The plea of *nul tiel corporation*, was there held to be bad on special demurrer, as amounting to the general issue, on the principle, that, whatever the plaintiff is bound, in the first instance to prove, in order to support his cause of action, cannot be specially pleaded by the defendant. And it has been settled by the Supreme Court, that where a corporation sues, it must show itself to be such on the trial, or be non-suited. [14 J. R. 238. 8 Ib. 378.]

This principle applies as well to foreign corporations as to our own; and there is no ground in this respect for any distinction between them. If it were otherwise, the fact, that the plaintiffs in this case are a corporate body, created by the laws of another state, is not averred on the record, so as to enable us to notice it.

*Judgment for the plaintiffs on the demurrer.*

[Ward and Hoyt, Atty. for the plffs. A. S. Garr, Atty. for the deft.]

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Clark & Clark  
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Burdeett.

RALPH CLARK AND ENOS P. CLARK

versus

JACOB BURDETT.

The defendant executed and delivered to the plaintiffs a guaranty in the following words: "New-York, 30th April, 1828.—I hereby guaranty the payment of any bill or bills of merchandize, Mrs. P. has purchased, or may purchase of E. P. C. & Co. The said Mrs. P. having the privilege of 90 days credit on the purchases made by her, the amount of this guaranty, not exceeding \$300, and this guaranty to expire at the end of one year from this date."

Help that this instrument was a continuing guaranty, and applicable to any goods delivered under it, not exceeding the specified amount, during the period limited.

Help also, that a demand of the purchaser, and notice to the defendant, were not necessary as conditions precedent to the plaintiffs' right of action.

Where there are several debts, some of which are guaranteed, and some are not, and a payment is made by the debtor, the creditor may apply it as he pleases, unless a special application is made by the debtor.

*24 Wend:*  
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ASSUMPSIT upon a guaranty. The declaration contained two special counts upon the instrument, besides the common counts, for goods sold, &c. Pleas, the general issue, and payment.

It appeared at the trial, that one Mrs. Phillips applied to the plaintiffs in the month of April, 1828, to purchase a quantity of dry goods upon credit. The plaintiffs being unwilling to furnish the goods without security, the applicant offered to procure the defendant's guaranty for the payment of such purchases as she might wish to make. The plaintiffs, therefore, drew up a guaranty, and sent it by their clerk to the defendant, and it was immediately signed by him. The instrument was in these words, viz: "New-York, 30th April, 1828. I hereby guaranty the payment of any bill or bills of merchandize Mrs. Phillips has purchased, or may purchase from E. P. Clark & Co.; the said Mrs. Phillips having the privilege of ninety days credit on the purchases made by her, the amount of this guaranty, not exceeding two hundred dollars, and this guaranty to expire at the end of one year from this date. JACOB BURDETT."

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After this paper was received by the plaintiffs, they delivered to Mrs. Phillips, on the 30th of April, 1828, a quantity of goods, amounting to \$198.73; on the third day of May following, another parcel, amounting to \$35.72, and at several different times afterwards, between that period and the 17th day of the same month, several other parcels, amounting in the whole to \$379.60.

On the 20th of June following, Mrs. P. called upon the plaintiffs to take back such goods as she had on hand, so as to reduce the amount of her debt to them as much as possible. The plaintiffs acceded to this request, and received back from her goods to the amount of \$200, and upwards, and were afterwards compelled to bring this action to recover the balance due from her, amounting to \$166.41.

For this sum the plaintiffs had a verdict, which was taken, however, subject to the opinion of the court upon a case to be made. If the court should be of opinion that the action could not be sustained, then a non-suit was to be entered.

*Mr. J. L. Mason* for the defendant, now contended, I. that the plaintiffs should have proved a demand of payment upon Mrs. Phillips, and notice of non-payment to the surety, in order to entitle them to this action. [4 M. and Sel. 574. Com. Dig. Surety, H. 2. 3 Wheat. 101-154. (n.) 8 East. 245.]

II. He also contended that the guaranty was void as to the goods, which *had been* purchased previous to its date, because no consideration for the defendant's promise appears upon the paper, and being void in fact, it was void *in toto*. [7 Term R. 201. 14 J. R. 465.]

III. The guaranty was a limited, and not a continuing one, and the payment made by Mrs. Phillips in goods, (amounting to \$200,) must be deemed applicable to the *first* purchase, and for which the defendant gave his guaranty. [Kirby v. Marlborough, 2 M. and Sel. 18.]

*Mr. D. B. Tallmadge*, contra for the plaintiffs, contended, that that the consideration for the promise was sufficiently apparent on the face of the instrument and proof of the delivery of the goods makes the cause of action complete.

The instrument itself is a continuing guaranty, and covers all goods sold under it, before the time limited therein for its continuance.

As to notice to the purchaser, no case can be found, where either notice or demand has been found necessary; for notice does not create the liability. The rule upon this subject is, that injury from want of notice must be made to appear, before the defendant can avail himself of this defence, unless such notice is a condition precedent. [He cited 9 *East.* 348. 1 *Holt's N. P. R.* 153. 3 *Moore's R.* 15. 6 *Ib.* 521. 3 *Brod. & Bing.* 211. 1 *Bing.* R. 216. *Mason v. Pritchard*, 2 *Camp. R.* 436.]

**OAKLEY J.** One Mrs. Phillips applied to the plaintiffs to purchase a quantity of goods. They declined delivering them without security. She offered the guaranty of the defendant, who signed and delivered to the plaintiffs the instrument, which is specially declared upon in this action.

The plaintiffs thereupon delivered to Mrs. P. a bill of goods amounting to \$198.73, and at several subsequent periods, sold her other goods, in the whole to the amount of \$379.60.

On the 20th of June, 1828, Mrs. P., wishing to give up her business, offered to return to the plaintiffs the goods she had on hand, so as to reduce the amount of her debt as much as possible, and the plaintiffs took them back to the amount of \$200, and upwards. This action is brought on the guaranty, to recover the balance due on the account of Mrs. P., being \$166.41.

**I.** The first objection made to the plaintiffs recovery, is, that he has not proved a demand on Mrs. P. for payment, and notice of non payment to the defendant.

I do not understand, that such a demand and notice are necessary to be proved, as conditions precedent to the plaintiffs' right of action. The guaranty of the defendant is not a conditional, but an original undertaking, collateral to the promise of the ven-

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dee of the goods, and the defendant cannot set up as a defence, any negligence of the plaintiffs, in calling upon the vendee for payment, unless, at least, he can show that such negligence has been the cause of injury to him. [*Dewal v. Trask*, 12 Mass. R. 156.] In the *People v. Jansen*, (7 J. R. 339.) The Court say, that in the case of a surety, the creditor is not bound to take any steps against the principal debtor, with a view to relieve the security, unless he should be required to enforce payment. In the present case, the omission to demand payment of the vendee of the goods, or to give notice of non-payment to the defendant, does not appear to have prejudiced him in any manner.

It would also be a sufficient answer to this point of the defence, that no objection was made at the trial, that a demand and notice were not proved.

II. It is objected also, that the guaranty is void, for the want of consideration, as to the goods, which had been purchased, and being void in part, is wholly so.

The guaranty applied to the facts, as they existed at the time it was entered into, must be understood, when it speaks of goods, which Mrs. P. *had purchased*, to allude to those, which she had contracted for, but which the plaintiffs would not deliver without security. It appears clearly in evidence, that all the goods sought to be covered by the guaranty were delivered after it was made. It is not necessary, therefore, to examine the correctness of the position assumed by the defendant's counsel, under this branch of the defence.

III. It is contended, that the guaranty is a limited one, and that the payment of \$200, made by Mrs. P., must be applied to satisfy it.

It is quite clear, that this guaranty is a continuing one, and by its express terms intended to secure any sale of goods, during the period of one year, not exceeding the specified amount. The return of a portion of the goods to the plaintiffs, can hardly be considered as a payment, by Mrs. P.; but if it could, it appears to be settled, that when there are several debts, some of which are guarantied, and some not, and a payment is made by the debtor, the creditor may apply it as he pleases, unless a special applica-

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tion is made by the debtor. [*Sturges v. Robbins*, 7 Mass. R. 301. *Hutchinson v. Bell*, 1 Taunton, 564. *Kirby v. Duke Marlborough*, 2 Mass. & Sel. 18.] Upon the whole case, I think that the plaintiffs are entitled to judgment.

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Cuyler.

### *Judgment for the plaintiffs.*

[*E. Curtis, Atty. for the pliffs.* — *J. L. Mason, Atty. for the def'ts.*]

DANIEL RICHARDS AND JEHAZIEL SHERMAN, JR.

versus

JOHN MALEY CUYLER AND FREDERICK CUYLER.

A plea, which amounts to the general issue, is bad on special demurrer, and it will amount to the general issue, when it shows a state of facts, from which it appears, that the plaintiff at no time had any cause of action. But when a plea is overruled, as equivalent to the general issue, it must be very clear that it is so.

THIS cause came before the Court upon special demurrs to two special pleas, interposed by the defendants.

The declaration was in assumpsit, and contained none but the common counts, for money paid, money lent and advanced, money had and received, &c., and the plaintiffs claimed \$800.

The defendants, besides the general issue, pleaded two special pleas. In their first, they alleged, that before the making of the promises in the declaration mentioned, the plaintiffs undertook and promised the defendants, that if they (the defendants) would undertake to deliver to the plaintiffs, in the City of New-York, on or before the first day of November, in the year 1828, a quantity of goods and merchandise, of the value of \$1000, to be sold by the plaintiffs for the defendants, on commission, for a certain profit, that they (the plaintiffs) would advance and pay to the de-

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defendants certain sums of money in consideration thereof, and that they (the plaintiffs) would sell the said goods, and out of the proceeds thereof, retain the sums of money to be advanced, and would not require the defendants to repay the same, but would pay the balance of such proceeds to the defendants, when the sales were completed.

The plea then averred, that the defendants did undertake to deliver the said goods to the plaintiffs at the time and place aforesaid, and that the plaintiffs, in consideration thereof, advanced and paid to the defendants, on the first day of November, 1828, "certain small sums of money, amounting in the whole to the sum of two hundred dollars," which were the same sums demanded in the declaration. The plea then further averred, that the defendants, in consideration of the sums so advanced by the plaintiffs, and of their said promise and undertaking, did afterwards, on the same first day of November, deliver to the plaintiffs at New-York, the goods and merchandise abovementioned, which the plaintiffs accepted, and still held, the same being unsold." These allegations were concluded by a verification; and the plea then proceeded as follows, viz : " And as to all the said several promises and undertakings, in the said declaration mentioned, except as to the said sum of two hundred dollars, so advanced and paid by the said plaintiff to the said defendants, parcel of the several sums of money mentioned in the said declaration, these defendants say, they did not undertake and promise in manner and form as the said plaintiff have above thereof declared against them," wherefore they prayed judgment, &c.

The second special plea was substantially like the first, but differed from it, by alleging the delivery of the goods to have been on the *second* day of November, (the day after that, on which they were, by the terms of the agreement, to have been delivered,) but that the plaintiffs accepted the same under the agreement, and sold them on the *same* day for one thousand dollars, which they received, and still held, &c. This plea concluded in all respects like the other, and denied the receipt of any sums beyond the two hundred dollars.

To these pleas the plaintiffs demurred, and for cause, alleged,  
 1. That the pleas amounted to the general issue ; and secondly,  
 that they were double, tendering several issues as to the alleged  
 delivery of the goods, their sale, &c.

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The cause was argued by *Mr. David Graham*, for the plaintiffs,  
 and *Mr. John Wallis*, for the defendants.

As to the first cause of demurrer, Mr. Graham cited *Archb. Pl.*  
*194. 10 John. Rep. 289. Stephens on Plead. 412. 9 Cranch. 30.*  
 As to the second cause, he cited *6 John. Rep. 63. 18 Ib. 28.*

*Mr. Wallis* cited *Ld. Raym. 787. 217. 1 Chit. 475.*

**OAKLEY J.** This case comes before the Court on separate de-  
 murrers to the 2d and 3d pleas, and the special cause of demurrer  
 assigned is, that the pleas amount to the general issue.

The rule on this subject is, that a plea, which amounts to the  
 general issue is bad on special demurrer, [*Kennedy v. Strong, 10*  
*J. R. 289;*] and in the application of this rule, it is held, perhaps  
 with some exceptions, that a special plea amounts to the general  
 issue, when it shows a state of facts, from which it clearly ap-  
 pears, that the plaintiff, at no time, had any cause of action.  
 [*Brown v. Cornish, Ld. Raym. 217. Vanhatton v. Morse, Lord*  
*Raym. 787.*]

The action, in this case, is assumpsit for money had and re-  
 ceived, &c. The 2d plea states, that in consideration, that the  
 defendants would deliver to the plaintiffs, on or before the first  
 day of November, a quantity of goods, &c., to be sold by the  
 plaintiffs on commission, they, the plaintiffs, promised to advance  
 to the defendants certain sums of money thereon, to sell the  
 goods, and retain the said advances out of the proceeds, and to  
 pay over the balance; and that the defendants should not be re-  
 quired to repay the advances in any other manner. The plea  
 then avers a delivery of the goods to the plaintiffs, and an advance  
 by them to the amount of \$2000; and it further avers, that the  
 plaintiffs received the goods, and have not yet sold them.

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The 3d plea differs from the second, in stating that the goods were delivered to the plaintiffs on the day after the advances in money were made to the defendants ; but it is averred, that the goods were accepted under the agreement, and before the commencement of the suit. The plea also avers, that the plaintiffs sold the goods for a larger amount than that advanced, and that they still retain the money.

The facts set forth in these pleas do not *necessarily* show, that the plaintiffs had not, at any time, a cause of action, arising out of the advances of the money in question. There may have been some breach of the special agreement, or some abandonment of it by the parties, subsequent to the advances, or to the sale of the property by the defendant, from which a right may have accrued to the plaintiffs, to sue for the money advanced, in this action. Such a state of the case may be disclosed in the replication ; and it is sufficient to show, that these pleas do not come clearly within the rule above laid down. When a plea is overruled as equivalent to the general issue, it must be very clear that it is so.

*Judgment for the defendants on the demurrers.*

[Wm. H. Munn, Atty for the piffs. John Wallis, Atty for the defts.]

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1828.

MALACHI KELLY versus JAMES R. MULLANY.

Kelly  
v.  
Mullany.

To an action of debt on a judgment obtained against the defendant, "in the term of February, 1827," in the Supreme Court, "then holden at the Capitol, in the City of Albany," the defendant pleaded in abatement to the jurisdiction of this Court, that "the cause of action, if any, accrued to the plaintiff in the County of Albany," &c. Upon demurrer to this plea, it was HELD, that if the plea were correct in point of principle, (upon the ground that the action of debt on judgment, is a local action;) it was, nevertheless, insufficient, because it did not show that the record of the judgment was filed in Albany.

THIS was an action of debt on a judgment. The declaration set forth, that the plaintiff, "in the term of February," in the year 1827, "in the Supreme Court of Judicature of the People of the State of New-York," "then holden at the Capitol, in the City of Albany, by the consideration and judgment of said Court, re- covered against the defendant six hundred and sixty dollars and seventy-seven and a half cents;" "as by the record and proceedings thereof, remaining in the said Supreme Court, more fully appears," &c.

The defendant pleaded in abatement, to the jurisdiction of this Court, "that the said City of Albany, in the declaration of the said plaintiff mentioned, is in the County of Albany;—the same being one of the counties of the State of New-York, within which, the said Supreme Court have cognizance of all pleas and actions;" "and that the cause of action in the said declaration mentioned, if any, accrued to the said plaintiff in the said County of Albany, and not in the City and County of New-York, or elsewhere out of the said County of Albany." Wherefore, the defendant prayed judgment, if "the said Superior Court will, or ought, to take cognizance of the plea aforesaid," &c.

To this plea, there was a demurrer, and for special causes, the plaintiff assigned the following: First, that the plea did not truly set forth the style and title of the said Supreme Court. II. That it did not state, that the cause of action accrued to the plaintiff out of the jurisdiction of this Court. III. That it did not state, that the said Supreme Court hath sole or exclusive cognizance of

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actions arising in the said County of Albany. IV. That the proceedings in this cause being by *plaint*, the plea ought to have prayed judgment, if the Court would take cognizance of the *plaint*; whereas it hath prayed judgment, if the Court would take cognizance of the *plea* aforesaid. V. That the plaintiff hath not by affidavit proved the truth of said plea, or shown any probable matter to induce the Court to believe that it is true.

The defendant having joined in the demurrer, *Mr. O'Conner*, for the plaintiff, contended,

I. That the special exceptions to the plea were well taken. It is an established rule, (he said,) that objections to the jurisdiction of a Superior Court of record must be pleaded, and in such form as to be free from all exception. (1 Chit. Plea. 427. Coup. R. 172, *Mostyn v. Fabrigas.*) The style of the Court, which has jurisdiction, must be truly set forth; for, in order to repel the jurisdiction of this Court, a more proper and sufficient jurisdiction must be shown. [1 Chit. Plea. 432.]

Here the plea neither states, that the cause of action arose out of the jurisdiction of this Court, nor that the jurisdiction of the Supreme Court is exclusive. *Non constat*, but the two Courts have concurrent jurisdiction over the subject matter. In addition to these objections, the prayer is totally defective. [*Attwood v. Davis*, 1 Barn. & Al. 172. Note to 2d Saund. 209.]

II. The truth of the plea should have been proved by affidavit; for a plea in abatement to the jurisdiction of a Superior Court of record, is not favoured in law, and all formal objections may be taken to it. The defendant should therefore have complied strictly with all the requirements of the law, relative to dilatory pleas. [1 R. L. 524, ss. 23. 1 Chit. Plea. 434. 3 Caines' R. 100, *Robinson v. Fisher.*] ]

III. The plea is bad in substance. The Supreme Court is endowed with legal ubiquity. Its judgments may be pleaded without a venue, and are by intendment of law, in no respect confined

to any particular county. It does not even appear, that the record is filed in Albany; *non constat*, but that it is here, in the City of New-York; for the records of the Supreme Court are filed as well here as at Albany. If there were an averment in the plea, that the record is filed in Albany, then the case might be brought within the scope of some of the English authorities. But if debt on judgment is a local action, in strictness, still the reasons why it is made so in England, do not apply to the State of New-York. Our Supreme Court has offices for its Clerks in three distinct counties; its sessions are held in different places; and in judgment of law, a record of the Supreme Court is no more confined to Albany, than it is to Utica, or the city of New-York.

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As the defendant can only bring himself within the scope of his own authorities by inference, this Court will not draw such inference against its own jurisdiction. On the other hand, it will infer, unless the contrary is clearly pointed out by the plea, that the record of the judgment on which this action is brought, is filed in the City and County of New-York. Why should the Court infer that the record is filed at Albany? It by no means follows, that because the judgment was rendered while the Supreme Court was sitting at Albany, that therefore the *record is filed* there. It may be, and probably is, filed in the City of New-York. If it is *not*, the defendant should have averred, that fact in his plea, that the plaintiff might have taken issue thereon, if it be material. It was not necessary to allege where the record was filed, in the declaration; for the Court will not oust itself of its jurisdiction by inferring a fact, which the defendant should have distinctly pleaded, if he intended to rely upon it. The plea, therefore, is wholly insufficient.

*Mr. James Oswald Grim, contra, for the defendant.*

I. The action of debt on a judgment is a local action, and this Court, therefore, cannot entertain jurisdiction of the present suit. It must be brought in the place where the judgment was recovered. [*Hall v. Winkfield, Hobart R. 195.*]

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The first question here is, where *is* the record of the judgment on which this suit is brought? In the absence of any thing in the declaration to the contrary, it will be inferred, that the record is filed, where the judgment was rendered. In this case, the declaration states, that the judgment was rendered at Albany, and the record must be there also, as a matter of course. The Court cannot *infer*, that it is any where else, because *prima facie*, that is the proper place for it. "In stating a matter of record, no venue "is necessary, as the record must be *presumed* to be where the "Court is." [Chit. Plea. Vol. 1, 281. 1 Vent. 246.] This being the legal intendment, if the record, in point of fact, is filed in the city of New-York, the plaintiff should have replied *that*, by way of a new assignment. "Although a replication must not "depart from any material allegation in the declaration, yet when "there is an evasive plea, the plaintiff may avoid the effect of it, "by restating the injury for which he meant to declare, with "more particularity and certainty, consistently, however, with "the more general complaint in the declaration." [1 Chit. Plea. 602.]

The authority of the case of *Hall v. Winkfield* has often been recognized by the Courts of this country. In the case of *Barracliff's executors v. Griscom's administrators*, (1 Cox, New-Jersey R. 193.) the Court say, "in actions of this nature, the venue must "be laid in the county *where the judgment was obtained*." Indeed, the rule is well settled, that "in an action of debt on the judgment of a Court of record, the venue must be laid in the county *where the record is*." [1 Chit. Plead. 272, *Barnes v. Kenyon*. 2 John. Cas. 381. 9th J. R. 259. 7 J. R. 318.] By the 5th sec. of the act establishing this Court, power is given them to try and determine all transitory actions, "and all local actions arising within the City and County of New-York."

If it be conceded, that the present is a local action, how can the plaintiff escape from the force of this plea? If it be good in substance, it is sufficient in form; because it expressly avers, that the plaintiff's cause of action accrued in the County of Albany, and not in the City and County of New-York. It is admitted, therefore, that the record is in existence, and the place where it is to

be found, is clearly pointed out by the plea ; for if the cause of action accrued in Albany, in an action of debt on judgment, it must be because the record of that judgment is filed in that County. If the plaintiff intended to deny the truth of the plea, he should have traversed the false allegations ; but by demurring, he has admitted, that the cause of action did not accrue to the plaintiff in the City and County of New-York. Whence, then, does this Court, in an action strictly local, derive its jurisdiction over a judgment obtained out of the County of New-York ?

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As to the special causes of demurrer, if the defendant is right in the general principle upon which his plea is founded, they cannot be sustained. The title of the Supreme Court is given in the very words of the act, and at all events the description is sufficiently specific. The requirements of the second cause, are complied with by the plea ; for it states, that the cause of action accrued at Albany. Now as Albany is beyond the jurisdiction of this Court, it follows that the cause of action accrued out of its jurisdiction.

As to the third cause, it was not necessary to state, that the Supreme Court had *exclusive* jurisdiction over actions arising in the County of Albany : for this Court might have no cognizance of a suit brought in it, and yet the Common Pleas might have cognizance over the same suit by express statute.

In this case, there was no necessity to prove the plea by affidavit ; the statute merely requires probable cause, and there is no necessity for an affidavit, where the plea is for matter apparent on the record. [Tidd's *Prac.* 588. 2 Sellon's *Prac.* 272.] But if an affidavit were necessary, the objection cannot be taken on demurrer ; it should be by motion. The affidavit forms no part of the record, and it may be made by a *third person* ; the want of it, therefore, is no objection upon the face of the pleadings.

The proper forum for this matter, is the Supreme Court, or the Common Pleas, for the County of Albany. The plaintiff is under no necessity of appealing to this tribunal, which was not established for the purpose of trying any local actions, except those originating within the very jurisdiction, which is given to this Court by law. All transitory actions may be brought here, of course, but those actions, which ought to be confined to their own proper

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tribunals, cannot be brought here, for any peculiar reasons of convenience.

OAKLEY J. This was an action of debt on a judgment in the Supreme Court. The declaration set forth, that the plaintiff, by the consideration of the said Court, "then holden at the Capitol, in the city of Albany," recovered judgment against the defendant, &c. To this declaration, the defendant pleaded in abatement to the jurisdiction of this Court: to which plea there was a demurrer.

It is contended, on the part of the defendants, that the Court has not jurisdiction in the present case, because it appears by the declaration, that the action is founded on the record of a judgment in the Supreme Court, obtained at Albany; that the record must be presumed to be filed there, and that the action is therefore local.

Assuming, for the purpose of disposing of the case, that an action of debt on a judgment is local, and must be brought in the county where the record is filed; I am of opinion, that it does not sufficiently appear in the pleadings in this cause, that the record of the judgment in question is filed in Albany. The declaration states that the plaintiff, "in the term of February, 1827, in the Supreme Court, then holden at the Capitol, in the City of Albany," recovered judgment against the defendant, as by the record thereof, "remaining in the said Supreme Court, before the Justices thereof," more fully appears.

The record of all judgments obtained in the Supreme Court may be filed in New-York, Albany, or Utica; and for any thing averred in this declaration, the record, on which this action is founded, may be filed in the Clerk's office in this city. It is not to be inferred, that it is filed in Albany, because it is stated, that the judgment was entered there. Such inference would be a necessary one, where by law the records of the judgments of a Court can be filed only where the Court sits; as in the case of the Courts of Common Pleas: but it cannot arise as to judgments in the Supreme Court, which has general jurisdiction, and in which all records may by law be filed, in either of the places designated for the holding of its regular terms.

If the fact, then, in the present case, be that the record in question is filed in Albany, the defendant should have averred that fact distinctly in his plea. The averment, that the cause of action occurred to the plaintiff in the County of Albany, and not in the City and County of New-York, nor elsewhere out of the County of Albany, is not sufficiently certain; as it is an averment equally applicable to transitory actions, (which in fact may have arisen in Albany,) and actions, which are local in their nature. There must, therefore, be judgment of *respondeat's ouster.*

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leste his wife.

[C. O'Conner, Atty for plff. J. O. Grim, Atty for deft.]

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**SAMUEL L. GOVERNEUR, THOMAS L. SMITH, AND CHARLES GILFERT.**

*versus.*

**HENRY ELLIOTT AND CELESTE HIS WIFE.**

A contract in writing and under seal, so executed as not to be binding upon either party, but which has been acted upon by them, may be given in evidence, in an action of assumpsit, to recover the balance of an account, for the purpose of shewing the terms on which one party made advances and the other performed services.

G. S. and G. the lessees of a theatre by their agent advanced certain sums of money to the defendant Celeste as a performer under an agreement, that she should be under the exclusive direction of one of the lessees, who was the Manager of the theatre. In an action brought to recover back a part of the advances so made, it was held that the action was properly brought in the name of all the lessees; and that the circumstance of the performers being under the exclusive direction of one of the plaintiffs did not vary the form of bringing the action. The jury must pass upon all the facts proper for their consideration and if they have not done so the Court will grant a new trial, without considering on which side the weight of evidence lies.

ASSUMPSIT brought by the plaintiffs to recover from the defendants, the sum of \$132, being the alleged balance of an account due from the latter to the former. The cause was tried before Mr.

June Term, 1829. Justice Hoffman. At the trial it appeared, that the plaintiffs were lessees of the Bowery Theatre in the City of New-York, and that the defendant Celeste was a dancer at that Theatre. The plaintiffs on their part offered evidence to show, that in the month of April, 1827, they had engaged the services of Celeste in France, and before her marriage with the defendant Henry Elliott, at a salary of \$37.50 per week. That she received of them an advance of \$473, before her departure from France, and a further advance, on her arrival in this country, of \$280, to defray the expenses of her own passage and that of her mother. Celeste performed at the Bowery Theatre, until it was destroyed by fire, on the first of June, 1828, and the plaintiffs, by their accounts, after giving her various credits, brought her in debt to the amount above claimed. During the period of her engagement at the theatre, Celeste married the defendant Henry Elliott, and the plaintiffs caused their accounts (claiming a balance of \$132) to be presented to the defendants, who made no objection to them.

The defendants, on their part, introduced in evidence a certain agreement under seal, bearing date at Paris, the 12th of April, 1827, purporting to be "between Charles Gilfert, of the City of New-York, Manager of the New-York Theatre, of the first part, and Celeste Keppler of the second part." It stipulated, that Celeste, for and in consideration of the covenants "on the part of the said Charles Gilfert to be performed," would perform at the Bowery Theatre for the space of two years, "under the direction, management, and appointment of the said Charles Gilfert," at and after the rate of \$37.50 per week, during the period of her engagement, and that *Gilfert* would pay, or cause to be paid, to Celeste her said salary. This agreement was duly signed, sealed, and delivered in the presence of a witness, and was executed by "Samuel Gouverneur, Jr. agent for the proprietors of the New-York Theatre," of the one part, and Celeste Keppler, of the other part.

By additional articles, it was further stipulated, that Celeste should receive an advance of \$473, in Paris, and that the plaintiffs should also, on her arrival in New-York, advance a sum sufficient to defray the expenses of her passage; each of which sums was

to be reimbursed at the rate of \$5 per week, by a deduction from her salary.

Madame Keppler, the mother of Celeste, being called as a witness, testified, that she was present at the execution of said agreement, and that the witness thereto, (a person belonging to the Italian Opera,) was not in this country.

After the agreement was executed, S. Gouverneur, Jr., and Severin, (the witness to the agreement) demanded \$173, "for *their commission*," and of the \$473 mentioned in the contract, Celeste received the sum of \$300, and no more.

The counsel for the plaintiffs objected to the production of the agreement in evidence at all; or at all events, until the defendants proved, that Gouverneur had signed it by virtue of an authority derived from the proprietors of the theatre. The objection was overruled by the presiding Judge, and the counsel for the plaintiffs excepted to his decision.

Madame K. then further testified, that by virtue of this agreement, Celeste came to America, and arrived at New-York on the first of June, 1827. Upon her arrival, she went to the Bowery Theatre, of which Gilfert was manager, and performed there under the agreement, until the theatre was destroyed by fire. Fifteen days after the destruction of the Bowery Theatre, Celeste obtained employment at the Park Theatre, but no salary was paid to her by the plaintiffs, for the time she was out of employment. The witness further testified, that Celeste was born in the year 1810, and was not yet nineteen years of age.

The defendants claimed a balance in *their* favour, insisting that the sum of \$173, retained by Gouverneur and Severin, was improperly retained, and that she was entitled to her salary for the fifteen days subsequent to the burning of the theatre.

The Judge charged the Jury, that if they believed, that the advances of money made to Celeste by the plaintiffs were made under the agreement, and if she came to this country, and put herself under the management of Gilfert in pursuance thereof, then that the action should have been brought in the name of Gilfert alone, and could not be sustained by the present plaintiffs. If the Jury came to this conclusion, they were instructed not to trouble

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themselves about the accounts at all, but to find for the defendants. If, however, they came to a different conclusion, they were instructed to examine the accounts, and find a verdict according to the evidence before them.

The counsel for the plaintiffs then prayed the Judge to charge the Jury, that if they believed, that the agreement made in France had been adopted by the plaintiffs, and not by Gilfert alone, then that the action was properly brought in its present form: but the Judge refused to give this instruction, and the counsel for the plaintiffs excepted to his opinion.

The Jury found a verdict for the defendants, and the plaintiffs now moved for a new trial, on the ground of a misdirection.

*Mr. J. Blunt*, for the plaintiffs, contended,

I. That the agreement was not proved to be executed in such a manner as to bind the plaintiffs. If an agreement under seal be executed by an agent, then the power of the agent must be shown to be under seal also. [5 Mass. R. 40. 2 Kent's Com. 478.] It should, at all events, have been shown, that the agent was authorized to sign for Gilfert, in order to sustain the Judge's charge; but, in point of fact, it was executed by Gouverneur, not as the agent of Gilfert, but for the proprietors of the Bowery Theatre.

II. If the agreement was adopted by the plaintiffs, then the action was properly brought in their names. But this question was taken from the consideration of the jury, and they were thereby misled, and by their verdict, they found that the contract was adopted by Gilfert alone. For these reasons, the Jury have not passed upon the proper questions of fact, and there should be a new trial.

*Mr. E. Curtis and Mr. D. B. Tallmadge*, for the defendants, *contra*, insisted, I. That the agreement was properly admitted in evidence, because it was proved, that the performance of Celeste at the theatre, was solely under that agreement. The Judge correctly decided, that the plaintiffs could not maintain this action, and it is therefore immaterial whether the person in whose name

it should be brought was properly pointed out or not. It is sufficient, that the plaintiffs are not the proper parties.

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II. The Judge correctly decided, that the Jury were not to pass upon the question as to whether the plaintiffs had or had not adopted the agreement. That could not change the form of the action, or the parties to it; but the plaintiffs, if they had rights under the agreements must assert them in the name of the person, who made the sealed contract. This is an agreement *inter partes*, and the action must be brought in the name of the person with whom the agreement was made, let the beneficial interest be where it may. This is a fixed rule of pleading.

III. The defendant Celeste was an infant, and that is a sufficient bar to the action. But even if the action is properly brought, and can be maintained in its present form, still the Court will not disturb the verdict; because, upon examining the accounts, it will be found, that there is a considerable balance due from the plaintiffs to the defendants.

OAKLEY J. The plaintiffs in this case, were proprietors of the Bowery Theatre. On the 12th of April, 1827, an agreement was entered into at Paris, between S. Gouverneur, jr. professing to act as agent of the said proprietors, and Celeste Keppler, now Elliott, by which the latter engaged to serve at the said theatre, as a dancer, for the term of two years, from the 1st of May then next, at a certain weekly allowance. Advances of money were made to her, on entering into the engagement, and also to pay her passage to this country; which, by the terms of the contract, were to be reimbursed, by retaining a certain sum from her weekly stipend. She came to New-York, in pursuance of this agreement, and continued to perform under it, until the destruction of the theatre by fire. Soon after that event, as may be inferred from the facts stated in the case, the contract was abandoned; and this action is now brought to recover a balance alleged to be due to the plaintiffs on account of the advances made by them.

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The objection taken at the trial to the plaintiffs' recovery was, that the action ought to have been brought by *Gilfert*, one of the plaintiffs, alone. The agreement in question, appears to have been entered into in the name of *Gilfert* alone, though it was signed by Gouverneur, as agent of the proprietors of the theatre. No authority was shown on the part of *Gouverneur* to enter into the contract, either for *Gilfert* or the proprietors, nor was the contract executed in such a manner, as to bind either of them, or the agent himself. The Judge, however, charged the Jury, that if they believed that the agreement given in evidence, was the one under which *Celeste* had received the advances in question ; that she had performed under it, and put herself under the direction of *Gilfert*, in pursuance of it, then the action should have been brought by *Gilfert* alone, and that in that case, they ought to find a verdict for the defendants ; and the Jury found accordingly.

It appears to me, that the Jury were misdirected. The money received by *Celeste*, was no doubt advanced under the agreement, but it was advanced for the plaintiffs ; and the fact, that she placed herself under the direction of *Gilfert*, as the manager of the theatre, cannot, I apprehend, be considered as giving him a right to sue, in his own name, to recover back the money advanced by the proprietors, of whom he was one. The agreement itself cannot be the ground of an action. It is only important to show the terms on which the advances were made, and the services rendered. The whole transaction amounts to nothing more than a contract between the plaintiffs and *Celeste*, under which she has rendered certain services, and received certain advances ; and the accounts between them may, for aught I see, be properly adjusted in the present suit.

It is suggested by the defendants' counsel, that it appears from the statement of the accounts, that there is actually a balance due to them. This fact, however, was never passed upon by the jury, and the same remark may be made as to the suggestion, that the infancy of *Celeste* shows a complete ground of defence in the suit. The jury, in giving their verdict, no doubt conformed to the direction of the Judge, and if that was erroneous, the plaintiffs

ought to have an opportunity of repelling, more particularly, the other grounds of defence.

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*New trial granted.*

[A. N. Gouverneur, Atty. for the piffs. E. Curtis, Atty for the defts.]

NOTE.—Upon the new trial, the Jury, upon examining the accounts, found a verdict for the defendants.

#### JAMES SMITH versus JAMES KELLY.

Where matters in controversy, between parties, have once been put in issue by them before a court of competent authority, and passed upon by that tribunal, in an action brought by the present defendant against the present plaintiff, the same matters cannot again be drawn into controversy in another action, in a different Court, brought by the former defendant against the former plaintiff.

The defendant in the former action, by submitting to the decision of the Court in which it was brought, becomes bound by it; and he cannot cause the decision to be collaterally revived, by bringing an action against the former plaintiff.

If the defendant in the first action feels himself aggrieved by the decision of the first tribunal, his course is to except to the opinion of the Judge, and cause his decision to be reviewed by a competent tribunal. If he acquiesces, however, in the decision, by not excepting to it, he is bound by it.

THIS was a special action on the case, brought to recover damages of the defendant, for not furnishing to the plaintiff certain goods, according to his undertaking on four certain orders drawn on the defendant by one Edmund M. Blunt, and by him accepted in blank.

One of the orders was dated in November 1826, the others in January 1827. The first was for sixty dollars; the others were for \$100 each, and they were all drawn in the following form, vix :

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Mr. James Kelly,

New-York, Jan. 3, 1827.

Sir, Value received pay bearer on demand, grates, fenders, pans, shovels and tongs, at cash prices, to the value of one hundred dollars.

Respectfully,

EDM. M. BLUNT.

This order was accepted in the usual manner, by the drawee writing his name across the face of it.

The declaration contained sixteen counts, to which was pleaded the general issue, accompanied by a notice, that the defendant would give in evidence in bar of the action, a former trial in a suit in the Court of Common Pleas, of the City of New-York wherein the said Kelly was plaintiff and the said Smith was defendant, in which the same matter sought to be examined in this suit, had been submitted to a jury and passed upon by them.

At the trial in this court (which took place on the third of February, 1829, before the Chief Justice) the plaintiff called the said Blunt as a witness, who testified, that in the month of January 1827, he negotiated the four orders in question to the plaintiff and received of him their full amount. That prior to the negotiating of the orders, the plaintiff was engaged in building some houses, and the witness solicited the plaintiff to allow him to furnish the houses with grates, pans, and fenders, and represented that he could obtain these articles of the defendant, *on accepted orders*, as cheap as the plaintiff could purchase them for cash; and he referred Smith to Kelly for the accuracy of his statement.

Blunt also testified, that he subsequently saw Kelly, and was informed by him, that the plaintiff had called upon the defendant in relation to the orders; that he had satisfied his inquiries relative to the goods, and had informed him, *that he would accept the orders, and deliver the articles under them*. That the witness then negotiated the orders to the plaintiff, the same having been previously accepted, by Kelly's writing his name upon the face of each of the orders. That some time after he had negotiated the orders, he saw Kelly, who informed him, that he was furnishing the goods upon the orders, and that he had let the plaintiff have

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two grates which he had made for other persons. The orders were negotiated within a few days after their date.

The plaintiff then called one Devereaux as a witness, who testified, that he was in the employment of the defendant, and that in the month of November, 1827, the defendant sent him to the plaintiff, in relation to a grate which had been made to be sent into the country. On this occasion, Kelly desired him to tell the plaintiff, that he was not willing to deliver any more grates on Blunt's orders, as he had been deceived by him. The plaintiff replied, that he would see justice done to Kelly, as he had a copy right of a book in his possession, belonging to Blunt.

These witnesses were examined on the trial in the Common Pleas, and testified to the same facts, which they now stated; and upon their evidence the plaintiff rested his cause.

The defendant then offered in evidence the record of the judgment in the former suit in the Common Pleas, from which it appeared, that Kelly had brought an action of assumpsit in that Court against Smith for goods sold and delivered, and the jury returned a verdict for \$156.18 in his favour. The particulars of the plaintiff's demand in that action amounting to \$322.68, were admitted in evidence at this trial, and among them were enumerated sundry grates fenders, shovels, tongs, &c., delivered by Kelly to Smith.

The present plaintiff to his plea in the former suit added a notice of set off, which contained copies of the four orders upon which this action was brought.

Daniel Lord, Jun. Esq., was then called by the plaintiff, and testified that he was the counsel for Smith in the former suit in the Common Pleas. At that trial, the defendant made no attempt to set off the orders against the plaintiff's demands, but he offered evidence of the parol acceptance of the orders by Kelly, and of his collateral undertaking to deliver the articles upon them, according to the testimony of Blunt. Smith also contended, that the goods mentioned in the plaintiff's bill of particulars, had been delivered on said orders and there was no attempt made to impeach the orders in any way. Mr. Lord, in summing up the defendants cause to the jury on that trial contended, that the mat-

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ters in evidence were a bar to the plaintiff's right of recovery. That Kelly was bound by his undertaking to deliver the goods *on the orders*, and would not rescind his contract, or in any way discharge himself from his obligations to deliver the goods on the orders.

Mr. Lord also testified, that he confidently expected a verdict for the defendant, although the Judge charged the jury, that *Kelly had a right whenever he pleased to refuse, to deliver any more goods upon the orders*, and that if Smith did *thereafter* receive any more goods, he would be liable to pay Kelly for them.

The plaintiff also called his honor, Judge Irving, as a witness, and he stated, that the principal point in the cause, according to the best of his recollection, related to the question, whether the goods were furnished upon the credit of Blunt or Smith. The Judge also produced and read his minutes of the whole trial; from which it appeared that Kelly had, in the first instance, accepted the four orders unconditionally, and had also promised to furnish the goods under them. But subsequently, owing to some delinquency on the part of Blunt in not making good his contracts, Kelly declined to deliver *any more goods under the orders*, although he had at the time of such refusal already furnished a part of them, amounting to one hundred and sixty dollars, and upwards. It appeared, however, that Smith had encouraged Kelly to furnish more goods, after his refusal to do so, by some promise of indemnity to be derived from the copy-right in his hands.

The defendant then called Blunt again, and proposed to enquire of him as to the original consideration of the orders. The plaintiff objected to such an examination, upon the ground, that the consideration of the orders as between the original parties, could not be inquired into *in this action*. The Chief Justice, however, overruled the objection, and the plaintiff excepted to his opinion.

Blunt then gave a history of the orders, and the manner in which they were issued, from which it appeared, that he had been in the habit of obtaining them, by giving his own notes in exchange. Some of these notes had been paid, but others remained unsatisfied, and at this time, Kelly held his notes for \$250 and upwards, which were wholly unsatisfied.

The defendant also called another witness, to show, that the goods furnished after Kelly's refusal, were furnished upon the credit of Smith, and not upon the faith of the orders. He also called one of the jurors empanelled in the former cause, and he testified that the course of the testimony on that trial, corresponded with the present, and the same evidence was given.

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The Chief Justice charged the Jury, that if they believed the testimony of Mr. Lord, then that the former trial was *conclusive* between the parties, and that they ought to find for the defendant.

The plaintiff having excepted to this charge, the Jury returned a verdict for the defendant.

The plaintiff now moved for a new trial, and Mr. Smith, *in propria persona*, contended, I. that Kelly was concluded by his acceptance of the orders, and by furnishing a part of the goods under them. After such acts, he became liable for the full amount of the orders, and had no right to interpose any objections against them. He did not contend, that these orders were so entirely negotiable, as that an action could be maintained against Kelly by *any* holder of the orders; but he asserted that Kelly had, by his own acts, fully recognised his claims, and could not afterwards repudiate the contract. He had commenced a fulfilment of his agreement with the plaintiff, by delivering a part of the goods, and he had no right afterwards, when he knew that Smith had paid Blunt the full amount of the orders, to rescind the contract, because Blunt became delinquent. The plaintiff had nothing to do with the consideration passing between the defendant and Blunt; for, value received, is admitted upon the face of the orders.

II. The former verdict in no way prejudiced the plaintiff's right to maintain the present action. The Jury on that trial, considered the goods furnished by Kelly, after his refusal to furnish any more on Blunt's orders, as having been furnished on the individual credit of Smith: and they accordingly found a verdict against the present plaintiff for all those items in the defendant's bill of particulars, which were furnished after Kelly's refusal. The plaintiff, therefore, has a right in this action to recover the difference between the face of the orders and the amount deducted by the Jury,

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or to recover of Kelly a sum in damages for the non-fulfilment of his contract. The charge of the Chief Justice was therefore erroneous, and the former trial and judgment form no bar to this action. If the question of consideration was material, then he contended that Blunt had in fact, paid Kelly the principal part of the money for which *these* orders were given, and if he was indebted to the defendant on other accounts, or for other orders, that could not prejudice the plaintiff. The orders could not have been *set off* against the claims of Kelly, and the Judge of the Common Pleas only meant to charge the Jury upon the evidence, so as to exclude a presumption that the goods were delivered upon the orders, and his discharge was right. But if the charge of the Chief Justice is correct, then the plaintiff is without a remedy. It is perfectly clear that he paid Blunt the full value of these orders, with the knowledge and assent of Kelly, and the latter is under every moral obligation to fulfil his contract. If a new trial is denied, then the defendant escapes with impunity; and the plaintiff is deluded out of his rights by the arts of counsel, which may be termed a sort of judicial legerdemain.

*Mr. Anthon, contra*, for the defendant contended, that the whole subject-matter, which formed the ground of the present action, had already been before a competent tribunal, on a trial between the same parties; that a Jury had passed upon the *same* facts, and a judgment had been rendered upon the finding of the Jury, which was binding and conclusive. [Stark. Ev. 198. *Gardner v. Bugbee*, 3 Cow. R. 120. *Burt v. Steenburgh*, 4 Ib. 559. *Stafford v. Clarke*. 2 Bing. R. 377.]

The whole question, which has now been raised, was presented before the Common Pleas, and the self-same evidence appeared. The present plaintiff then denied his responsibility to Kelly, upon the ground that the latter had furnished the goods for which the action was brought, not upon the credit of Smith, but upon the orders of Blunt. The Jury found that this defendant had in fact furnished *a part* of the goods upon the credit of the orders; but they also found that he had furnished *another* part upon the credit of Smith alone, having refused to trust Blunt any longer.

The present plaintiff also contended on that occasion, that Kelly was liable at all events to him, for the full amount of the orders; that he had *contracted* with him by the force of his acceptance and his subsequent acts, and that therefore he (Smith) was not liable in law to pay for any part of the articles furnished. What more does he claim here? He now contends that the orders were binding upon Smith; and that as the Judge of the Common Pleas decided, that the orders were not available to their fullest extent,—because Kelly had a right to repudiate them at any time as to third persons,—they are now available by way of attack, because, in truth, Kelly had *not* a right to repudiate the orders as to a third person, who had paid value for them, with Kelly's consent and approbation.

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The two questions are therefore precisely the same. If Kelly was liable to Smith to the full extent of the orders, then he had a perfect defence to the former action, and the Judge of the Common Pleas erred in his charge to the Jury. If Smith was dissatisfied with that charge, he should have excepted, and should have reviewed that opinion before the proper tribunal. Instead of taking that course, he has acquiesced in that judgment, and is now concluded by his own acts. If, however, the Judge was right on that occasion, then the plaintiff has no cause of action here, because Kelly had a right to refuse a delivery of any goods upon the orders.

Under any aspect of the case, the same identical questions have been presented, tried, and disposed of. The former judgment is conclusive between the parties, and the charge of the Chief Justice was perfectly correct.

If, however, it were necessary or proper to go into the matters of the former trial, it would be easy to show, that the Judge, who tried that cause, was correct in his charge, and that the Jury found according to the evidence, and the very right of the case. But the defendant now rests himself upon his first proposition, and is secure.

*Smith, in reply.*

I admit that the charge of Judge IRVING was correct, and I contend that the Jury had a right to find, that a part of the goods

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were furnished upon my individual credit, and not upon the orders. If so, I was bound to pay for those goods; but it does not follow, that because Kelly refused to perform his contract, and because he furnished a certain part of the goods upon my responsibility, that therefore he is *absolved* from his contract. The former trial was no more than this. The plaintiff there proved that he refused to deliver me any more of the specified articles *upon the orders*, because he did not feel himself bound to *me* upon them. But he offers to furnish me with goods upon my own responsibility. I accede to the terms, and order the goods; must I not pay for them? And does it follow from this, that Kelly is not legally bound by his acceptance of Blunt's orders, and that I have no right to try that question with him here? My promise to pay for the goods, was aside from the contract, and had nothing to do with it; and the sole question to be disposed of is, whether Kelly is, or is not responsible upon his acceptance, under all the circumstances of this case. If he is, then I am entitled to recover; if he is not, there is an end of the question. The scope of Judge IRVING's charge was merely this, that I might be liable to pay for the goods furnished after Kelly's refusal, *notwithstanding* the contract, because there was evidence to show, that the goods were not furnished *under* the contract. This was perfectly correct, and left the parties the right of trying the naked question, as to the defendant's obligations upon the orders. I contend, therefore, that the former trial is no bar to this action, and that I am entitled to a new trial.

OAKLEY J. The plaintiff in this case moves for a new trial, for the misdirection of the Judge. It is a special action on the case, to recover damages for the refusal of the defendant to deliver certain articles, in pursuance of orders, drawn on and accepted by him, and subsequently negotiated to the plaintiff. It appeared in evidence, that the defendant delivered a portion of the articles, under the orders, and then refused to proceed any further, on the delivery, alleging that he had been defrauded by the person, who drew the orders. Articles, however, of the same description were subsequently furnished by the defendant to the plaintiff, and an

action was brought in the Court of Common Pleas, to recover the amount of his bill. That action was tried in the Common Pleas, and the same evidence was given as in the present case. The present plaintiff then contended, that the goods in question were delivered under the said orders, and his defence, according to the evidence given by his counsel, *Mr. Lord*, was rested on the ground, that the then plaintiff was bound to deliver the articles, under the said orders, and could not rescind them. The Judge, at that trial, charged the Jury, as Mr. Lord stated, that *Kelly* had a right, whenever he pleased, to refuse delivering any more goods on the orders. The Jury in that case found a verdict for *Kelly*, for the goods furnished subsequent to the notice given by him to *Smith*, that he would not consider the orders as any longer binding upon him.

If the charge of the presiding Judge, at that trial, was correctly stated by Mr. Lord, it cannot be doubted, that the same questions, both of law and fact, were then considered, which have arisen in the case now before us; and the Jury, in the former case, must have found their verdict in pursuance of the rule laid down by the Judge. If that decision of the Court of Common Pleas was erroneous, the present plaintiff should have excepted to it. He cannot review it in a new action. Having acquiesced in the law, as pronounced by a court of competent authority, he is bound by it. There was, therefore, no error committed by the Judge in the present case, in instructing the Jury, that if they believed the testimony of *Lord*, the former trial was conclusive between the parties. The motion for a new trial must therefore be denied.

*Motion for a new trial denied.*

[James Smith, *in pro. per. Atty. for the pif.* Chas. O'Conner, *Atty. for the deft.*]

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## CASES IN THE SUPERIOR COURT OF

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Higgins  
v.  
Packard and  
others.

ELLIOT HIGGINS

versus

HENRY PACKARD, SCOTT FICKETT, FRANCIS FICKETT, AND  
JOHN W. RUSSELL.

P., one of the defendants, agreed with R., another of the defendants, in the month of July, 1825, to purchase one fourth part of a ship of him, which had performed but one voyage, at one fourth of her original cost, and to come in as a part owner from the beginning. He was accordingly debited by R. with that amount, and credited with one fourth part of the profits of the voyage. HELD, that this purchase did not constitute P. such an owner from the beginning, as to make him liable for bills of the ship, which had accrued before the voyage was performed.

Quere—As to the effect of taking the promissory note of *one* of several joint owners, for a debt of the whole?

Quere, also, as to the admissibility of the books of one of the joint owners, in an action by a third person, for the purpose of showing that another of the joint owners had fulfilled all his stipulations with such owner, and had paid for his proportion of the vessel?

ASSUMPSIT to recover the sum of \$287.25, with interest from the 21st of May, 1825, for work, labour, &c. in rigging the ship Russell, alleged to have been owned by the defendants. Plea, the general issue. The cause was tried before the Chief Justice, on the 4th of February, 1829.

At the trial, the principal question in dispute was, whether the defendant, *Packard*, was in fact the owner of any part of the vessel *at the time* the plaintiff's services were performed. The defendants insisted, that the amount claimed was due to the plaintiff from such persons only as owned the ship at the time the services were rendered; and it was admitted, that those services were performed between the last of April, 1825, and the 21st of May of the same year.

The plaintiff, on his part, to establish the joint ownership, called several witnesses to show, that *Packard*, who was master of the

Russell, was frequently on board while the plaintiff was rigging that ship, and gave general directions concerning the work; and from certain expressions used by him, it might be inferred, that he was a part owner at the time the plaintiff's work was performed. Indeed, one of the witnesses, (Gorham, a sail-maker,) testified, that Packard took one of the sails of another vessel, of which he was a part owner, and caused it to be used in covering the ropes of the Russell. This witness heard Packard say, while the work was going on, that he was a part owner of the ship; and the other defendants had made the same admissions.

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The testimony of the plaintiff consisted, almost exclusively, of the declarations and acts of Packard, the most material of which have been already related.

The defendants, on their part, produced the deposition of one Henry W. Barstow, who was a clerk of the defendant Russell, at the time the plaintiff's work was performed on the ship. He testified *positively*, that Packard had no interest in the vessel at *that time*, or at any other time, until after her first voyage. The vessel was intended as a packet between New-York and New-Orleans, and was to be commanded by Packard. Russell offered to sell Packard one fourth of the vessel, at the original cost, before her first voyage, and gave him the option to take that proportion upon those terms, after the voyage was performed. After the ship's return, Packard accepted Russell's offer, and purchased one fourth part of him, he being the owner of three fourths, and the other defendants of one fourth. The ship returned from her first voyage in July, 1825, and Packard having then elected to take an interest in her, one fourth part of her original cost was passed to his debit, in general account by Russell, who gave him a regular bill of sale of one fourth part of the ship, for the consideration of \$6.600. The bill of sale bore date the 17th of September, 1825, and was executed in due form of law.

The defendants also produced a receipt, signed by the plaintiff, in the following words: "Rec'd. New-York, Oct. 7, 1825, from John W. Russell, his note of the 6th inst. at 60 days, for six hundred and two 87-100 dollars in full for bills, up to August last;"

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and it was proved, that this sum included the bill, for which this action was brought.

The defendants also offered Russell's books of account, (which the plaintiff had called for,) in evidence, in order to show the state of his accounts with Packard ; the plaintiff objected to the admission of this evidence, but the defendants having proved, that the entries were in the hand-writing of a clerk, who was dead, the Chief Justice overruled the objection, and the accounts were read to the Jury.

After the defendants had gone through with their evidence, the plaintiff produced the note of Russell for \$602.87, showed that it had never been paid, and offered to cancel it in court. The plaintiff also proved, and the defendants admitted, that Packard received and was credited by Russell with one fourth part of the profits of the first voyage of the ship, he having the election to come in, as a part owner from the beginning.

Upon this evidence, by consent of parties, a verdict was taken for the plaintiff, subject to the opinion of the court upon a case to be made.

The cause was now argued by *Mr. Ashton* for the plaintiff, and *Mr. Talman* for the defendants.

For the plaintiff it was contended, that the acts of the defendant Packard, coupled with his admissions to Gorham, completely established the fact, that he was a part owner from the beginning.

II. That the taking of the note of Russell, one of the part owners, who was the ship's husband, did not vary the rights of the plaintiff against *all* the owners. No damage was suffered by the other defendants, by this course of dealing, as they, in their accounts, had not paid money to each other, but had brought in various matters of account. [1 *Coven R.* 297.]

III. The books of Russell were inadmissible in evidence, and the death of the clerk, who made the entries, gave the defendants no additional rights. If the clerk were alive, the accounts could not have been proved by him and made evidence, being *res inter*

*alios. [Bul. N. P. 282. 2 Esp. R. 646, and notes by Day. 8 John. R. 212.]*

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For the *defendants* it was contended, I. that Packard was not an owner at the time the plaintiff's demand accrued. He had an election to become part owner or not, and he did not elect to become such owner, until long after the plaintiff's services were performed. He was then charged with one fourth of the cost, and credited with one fourth of the earnings. The agreement had no reference to *time*, but only to *price*; hence, in order to ascertain what Packard was to pay, the profits of the ship were passed to his credit. If this had not been done, he would have paid the same sum for the ship after the deteriorations of a voyage, as when new.

II. The books were produced upon the plaintiff's own call, and they were admissible to establish a fact, which might as well be proved in that way as any other. The defendant, Packard, wished to show, from the books, that he had settled with Russell for his one fourth of the ship, and the books were clearly admissible. [*Wharam v. Routledge*, 5 Esp. R. 235.]

III. The facts of the case warrant the conclusion, that the note of Russell, taken by the plaintiff, was at the time intended, and agreed to be considered, as a payment of the demand. [12 John. R. 409, *Arnold v. Camp. Reed v. White & al.* 5 Esp. R. p. 122.]

IV. The original credit was given to the defendant Russell, and the plaintiff having taken the note of Russell upon a balance of account, including the demand in question, and given Russell a receipt in full, and the other defendants having, since the receipt, settled with Russell, and paid him their proportions of the plaintiff's bill, they were discharged. [*Muldon v. Whitlock*, 1 Cowen R. 290, and the cases there.]

*Anthon*, in reply, observed, that the plaintiff was not to be prejudiced by taking the note; for when it was taken, he did not

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know, who the owners were, nor who were liable to him. In the case cited from Cowen, all the owners were known, and a receipt in full was taken, with a full knowledge of all the facts. But no court has ever decided, that a note given by one of several persons, for services performed for them *all*, should be considered as a discharge of the others, unless the responsible parties were known, at the time the note was taken, to him, who received it.

[*7 John. R.* 311.]

OAKLEY J. This case comes before us on a verdict subject to the opinion of the court. The action is to recover the amount of a bill for work, in rigging the *ship Russell*, in the month of May, 1825; and the principal question of fact to be determined is, whether *Packard* was a part owner of the ship, at the time the work was done. The ownership of the other defendants is admitted.

I am satisfied, on a careful examination of the case, that the decided weight of the evidence is, that *Packard* had no interest in the ship, when the plaintiff's demand for work accrued. The testimony of *H. W. Barstow*, together with the bill of sale of the fourth part of the ship to *Packard*, is sufficient, in my judgment, to outweigh the proof of the declarations of *Packard*, as stated in the case. The evidence of the declarations of a party, is at all times to be received with great caution, and is of all species of evidence, the least satisfactory.

It appears, that on the return of the ship from her first voyage, in July, 1825, the defendant *Packard* agreed to purchase one fourth part, at her original cost, and to come in as a part owner from the beginning. Accordingly he was charged with his portion of the expense of the outfit of the vessel, for her first voyage, and credited with a portion of the profits of that voyage. This cannot be considered as constituting him a part owner from the beginning, so as to render him liable, to third persons, for demands against the vessel, accruing before he had any actual interest in her. It was adopted merely as a mode of ascertaining, as between *Russell* and *Packard*, the price to be paid by the latter on his purchase. It is quite clear, that in performing the work in question, the plaintiff did not look to the responsibility of *Packard*.

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He trusted Russell alone, and took his individual note for the amount of his demand. *Packard* can be made liable only as being in fact a part owner of the ship, at the time the work was done, in which case, the law would render him liable, though his interest in the vessel might not have been known to the plaintiff. The proof, I think, shows, that *Packard* was not, in fact, a part owner of the ship at the time, and there must be judgment, therefore, on this case, for the defendants, no joint assumpsit on their part being established.

The view I have taken of the case renders it unnecessary for me to examine the other points raised on the argument.

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## *Judgment for the defendants.*

[E. Anthon, Atty. for the plff. J. Leveridge, Atty. for the def/s.]

## **PATRICK G. HILDRETH versus JOHN SHILLABEE, JUN.**

A plea of a discharge under the 9th sec. of the general insolvent act, [1. R. L. 464.] must aver every fact necessary to give jurisdiction to the officer granting it, and the want of such averments cannot be supplied by the recitals contained in the discharge itself, though the discharge be set forth at large in the plea. By this act it is essential, in order to give the magistrate jurisdiction over the case, that the debtor should have been imprisoned for 60 days upon *execution* in a civil suit. A plea, therefore, which merely set forth, that the debtor was *imprisoned* for 60 days and upwards, on civil suit, was held to be insufficient.

To an action of debt on judgment, the defendant pleaded his discharge under the insolvent act; and the plaintiff replied, that after the discharge was obtained the defendant "assented to, ratified, renewed and confirmed the said judgment and demand of the plaintiff." HELD, that the replication was no departure from the count, and that the new promise was sufficiently laid in the replication.

**DEBT,** to recover \$2,515.25, due from the defendant to the plaintiff, on a judgment obtained in the Supreme Court in the year 1816.

The defendant pleaded, 1. *nul tiel record.* II. a discharge under the 9th section of the general insolvent act, [1 R. L. p. 464.]

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This plea alleged, "that after the making of the supposed promises and undertakings, in the plaintiff's declaration mentioned, to wit on the fifth day of December, in the year 1816, the said defendant was and had been, *actually imprisoned for 60 days and upwards in a civil action* within the true intent and meaning of the act &c., and that "whilst the said defendant was and had been *so actually imprisoned* for 60 days and upwards in a civil action as aforesaid, one William Hall a creditor of the said defendant," &c.

The discharge itself was then set out at length in the plea, and that recited also, that the defendant had been actually imprisoned for 60 days and upwards, in a civil action, and that his creditor made *affidavit*, that the said insolvent "was then in prison on execution issued against him in a civil action, and had been so imprisoned for 60 days and upwards," &c.

Upon the first plea the plaintiff took issue and replied to the second, alleging that the defendant "after obtaining his discharge in said second plea mentioned, and before the commencement of this suit, to wit, on the first day of January, in the year 1820, at the City and County of New-York aforesaid, assented to and then and there ratified, renewed and confirmed the said judgment and demand of him, the said plaintiff, in the said declaration mentioned," &c.

To this replication the defendant demurred generally, and the plaintiff joined in the demurrer.

*Hugh Maxwell, Esq.*, for the defendant, and in support of the demurrer contended,

I. That the replication was a departure from the count. The foundation of the declaration is a matter of record, and the plaintiff cannot, by parol proof, substitute in its place a collateral matter by his replication; for thereby, a judgment in *assumpsit* would be rendered in an action of debt, [4 T. R. 504. 1 Salk. 221. Co. Lit. 304. a. 6 Mass. R. 57. 1 Chit. Plead. 618. 2 Saund. R. 84. a. n. 1.]

II. The judgment was the act of the law, and having been discharged by the law, it cannot be renewed by parol. The issue is

not offered on the promise to pay, but on the question as to whether the defendant has or has not done an act, whereby he has renewed, ratified and confirmed the judgment. Now, this is an act of a court, not of a party, for a judgment can only be renewed by law.

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This release obtained by the operation of law, is much stronger than a release by the mere act of a party, and yet it is well settled, that a debt once released by the act of the creditor cannot be revived by a subsequent promise. There is nothing left for the new promise to act upon; the original liability being extinguished by the act of the party is not in existence, so as to be the subject of a promise except upon a new consideration, and it could not therefore be renewed. Every thing, which is done in relation to it, must be a new creation; there must be a fresh consideration as well as a new promise, or the contract would have no legal existence. So here, the original liability being extinguished by the discharge, was entirely gone and there was nothing for the new promise to attach itself to, without a new consideration; for the promise without the consideration would be a nullity. By the plea, it appears, that the defendant was discharged from all debts; the replication admits the plea to be true, and therefore, admits that the judgment was discharged by law. There is nothing left therefore to be the subject of renewal and confirmation. The judgment was the record evidence of the existence of a debt, but as the debt was discharged, the judgment was legally satisfied, and there was no foundation for a renewal and ratification of the judgment by means of the defendant's *assent*. There is some absurdity in saying, that a judgment was "assented to and ratified":—for a judgment, being the decree of a court, needs no assent from the debtor to give it validity, and cannot be set up or pulled down by his volition. We show a legal extinguishment of the debt and a satisfaction of the judgment, which was the evidence of it, and the replication does not show any thing to create a legal liability on the part of the defendant. He could not renew a judgment himself, except by permitting a new one to be entered up against him, and the replication therefore is bad upon its

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face. [3 Cranch's R. 300. Com. Dig. Plead. 2. W. 12. 1 Gal.  
Hison's R. 32. 4 Burr. R. 2482.]

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III. We do not deny that a debt, barred by the statute of limitations, or by other means put beyond the creditor's power, may be renewed by a new promise, because equity in such cases, upholds the new promise by means of the original consideration. But a judgment discharged in law is discharged in equity, and a promise to renew is therefore *nudum pactum*.

*Mr. James Tallmadge*, for the plaintiff, *contra*, insisted,

I. That the replication to the second plea was sufficient. It alleges, that the defendant *after his discharge*, "ratified, renewed and confirmed the judgment." By the discharge, the judgment was not *extinguished*; it remained as a lien upon all the property of the defendant, which was at the time of the docketing of the judgment, the subject of a lien. If it could be shown, that the defendant was the owner of real estate at that time, the judgment would still attach itself to such real estate, notwithstanding the discharge. It is a mistake, therefore, to suppose the judgment to be gone in consequence of the discharge; it still binds all property upon which it was a lien.

The defendant owed the plaintiff a debt, which he had promised to pay. Before the fulfilment of this promise, the defendant obtained his discharge under the insolvent act. This discharge he may interpose between his original liability and promise, and any act of his creditor, which seeks to compel a performance of the promise. The moral obligation to pay the debt remains, and the defence afforded by the discharge may at any time be waived by the party for whose benefit it was obtained. If he make a promise to pay the debt, which thus morally remains, after obtaining the discharge, he throws away his defence and stands as he did before the discharge was granted. No new consideration is necessary to uphold the new promise; for the original consideration attaches itself to the new promise, and becomes a part of the new liability.

In such cases, it is proper in pleading to declare upon the original promise. The defendant then sets up his discharge. The defendant cannot deny *that*; but he states new matter, which shows not an *entirely* new contract, but that the defendant has voluntarily abandoned that, which, but for the new promise, would be a sufficient defence. This is no departure: for it does not set up an entire new contract. On the contrary, it shows a circumstance perfectly consistent with the original agreement set out in the declaration, and points out how that agreement is to be, under a change of circumstances, upheld and supported.

There are adjudged cases, which support these principles fully; and there is no difference between this case and those already decided, except that, which arises from the fact, that we declare upon a judgment. What is a judgment? Is it not the record evidence of the existence of a debt? And in declaring, must we not count upon that evidence? By the very act of obtaining the judgment, all evidences of debt became merged in the judgment; and we, of course, were compelled to resort to that, which was left to us. The words used in the plea show that the defendant waived his discharge, and if insufficient in point of form, they are good in substance, and cannot, therefore, be reached by a general demurrer. For these reasons, we deem the replication sufficient.  
[8 Mass. R. 127. *Shippey v. Henderson.* 14 John. R. 178. 1 Chit. Plead. 40.]

II. But if the replication should be considered as bad, the defendant cannot escape upon these pleadings; for it will be found, upon examination, that he is the first offender. His plea is bad, and the plaintiff will, therefore, be entitled to judgment, let the fate of the replication be what it may. The plea is no answer to the declaration; for it nowhere alleges, that the plaintiff's judgment was barred, or even affected by the discharge. Neither does it admit the recovery of the judgment declared on, which it should do, if it intends to avoid it, by matter *ex post facto*.

The plea is also bad, because it neither names the court, in which the judgment was obtained, nor the person upon whose suit it was rendered. It does not name the court from which the

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There is also another difficulty in the way. The plea of an insolvent's discharge cannot be joined with a plea of *nul tie record*. But waiving this consideration, there is nothing in the plea, which shows jurisdiction in the officer, who granted the discharge. The jurisdiction cannot be inferred by the court, but must be set out with precision by the plea. The act gives authority to certain officers to entertain petitions, and grant discharges to insolvents in *certain cases*. The plea must show distinctly all that the act requires. To give jurisdiction to the magistrate, there must be, I. imprisonment; II. the application of a creditor, together with his affidavit. And it must distinctly appear, that the petitioner has been imprisoned sixty days and upwards, on *execution*, in a civil action. Now it does not appear from this plea, that the defendant was imprisoned on an execution: he might have been arrested and detained on *mesne* process, for any thing contained in this plea; and the court cannot *infer*, that the imprisonment was on execution.

It is true, the affidavit of the creditor states that fact, but the plea cannot be aided by the affidavit. The averment in the affidavit presents no issue; it cannot be traversed, and the plea is fatally defective in this important particular. [The learned counsel cited in the course of his argument, and to various points illustrative of his views, (and which could not well be taken down,) the following cases, viz : 7 J. R. 75. *Frary v. Dakin.* 10 Ib. 161. *Morgan v. Dyer.* 11 Ib. 224. *Jenks v. Stebbins.* 2 Salk. 517. 7 Cowen's R. 442. 1 Saund. 298. n. 1. 20 John. R. 159, 161. *Andrus v. Waring.* 1 Chit. Plead. 217, 236-7, 240.]

*Maxwell* in reply, observed, that the defendant would be deprived of an important right, if the plaintiff could pursue the course adopted. If the plaintiff relied upon the new promise, he should have declared upon it, and then the defendant would have had the statute of limitations as his defence, if he should think fit to avail himself of it. By declaring upon the judgment, this privilege is taken from him, and he is deprived of a fair legal right

OAKLEY J. The first question arising on the demurrer in this case is, as to the sufficiency of the defendant's second plea. The action is debt on judgment; and the plea sets up a discharge under the 9th section of the general insolvent act. [1 R. L. 464.]

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In the case of *Delavan v. Stanton*,\* decided at the present term, it was held, that a plea of a discharge under this act, must aver every fact, necessary to give jurisdiction to the officer granting it; and that the want of such averment could not be supplied by the recitals contained in the discharge itself, though that be set forth at length in the plea. By the act in question, it is provided, that any creditor of any person, who shall have been imprisoned for sixty days, *upon execution* in any civil action, may apply for relief, &c. The fact of the imprisonment of the debtor, on execution, is essential, to authorize the officer to take cognizance of the case; and such fact must, therefore, be averred. In the present plea, the averment is, that the debtor had been imprisoned, for sixty days and upwards, *on a civil action*. For any thing here alleged, the imprisonment may have been on *mesne process*, and in that case the law did not authorize the creditor to make the application, on which the discharge was granted. Without noting the other objections to the plea, this is fatal to it.

The question, however, most important to the parties arises on the replication to this plea. To defeat the operation of the discharge, the plaintiff says, that after it was obtained, the defendant "assented to, ratified, renewed, and confirmed the said "judgment and demand of the plaintiff."

In *Shippey v. Henderson*, (14 J. R. 178,) the action was *assumpsit* for goods sold, &c. And to a plea of the defendant's discharge, there was a replication, in the same words with the present. The Supreme Court held, that the action was properly brought on the *original promise*; that the new promise was sufficiently laid: and that the replication was no departure from the declaration. The court say, that the discharge does not make the original contract void, but suspends every remedy upon it; and that the new promise merely removes the bar interposed by the plea.

\* Ante p. 190.

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This case would seem to be decisive, unless there is some distinction, growing out of the fact, that the present action is founded on a judgment. I cannot perceive any good reason for making any distinction. The judgment is not affected by the discharge, any further, than to release the defendant from any personal liability on it, and to prevent its attaching as a lien, on subsequently acquired lands. It remains operative as to any existing lien, and may be enforced against any property of the defendant, bound by it, at the time of the discharge. The discharge, therefore, only bars, or suspends any personal remedy on the judgment against the defendant; and I see no reason why a promise to pay the judgment, after the discharge, (and the replication substantially avers such a promise,) may not be relied on, as removing that bar, upon the authority of *Shippey v. Henderson*. The judgment, as evidence of a personal contract between the parties, is certainly as capable of being set up and renewed by a new promise as any ordinary assumpsit.

This view of the case accords with the doctrine of the Supreme Court of Massachusetts, (8 Mass. R. 127,) where the very question now before us has been decided, and upon a state of pleadings substantially like the present.

*Judgment for the plaintiff.*

[Wm. H. Bulkley, Atty. for the plff.      Wm. P. Hawes, Atty. for the deft.]

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THE MORRIS CANAL AND BANKING COMPANY

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SEIXAS NATHAN.

The defendant signed a subscription for a certain number of shares in the stock of the Morris Canal and Banking Company; which subscription was upon condition, that 3000 shares of the stock, then held by the Company itself, should be subscribed for within 90 days from its date; and this fact was to be certified by at least two of the Directors, and by the Cashier of said Company. The President, Cashier and two of the Directors signed the requisite certificate, and the defendant paid the first instalment on his stock. Refusing to pay the subsequent instalments, an action was brought against him upon his subscription; and at the trial he offered to show that the 3000 shares of stock, mentioned in the agreement, had never been subscribed, as stated in the certificate, and that the persons, who signed it, did so fraudulently, knowing it to be untrue.

This evidence was rejected by the presiding judge, and the court granted a new trial, upon the ground that the testimony thus offered was admissible, the certificate itself, if false and fraudulent, being a mere nullity.

ASSUMPSIT to recover of the defendant an amount due from him, upon a certain subscription for stock in the Morris Canal and Banking Company.

The declaration contained two counts, upon an agreement in writing, of the following tenor, viz :

"The undersigned, with a view to fill up in part the shares of  
"stock in the Morris Canal and Banking Company, which has not  
"been effectually subscribed for, and thereby enable the directors  
"to proceed in the completion of the canal, do hereby mutually  
"agree, and severally bind ourselves to the Morris Canal and  
"Banking Company, that we will severally take and complete  
"the payments on, and we do hereby accordingly severally sub-  
"scribe the number of shares towards the capital stock of the said  
"Company, affixed to our respective names, in *addition* to the  
"shares of the said stock, which any of us may now hold, subject  
"nevertheless to the following conditions, to wit :

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"First. At least 3000 shares of the stock now held by the company, shall be *bonâ fide* subscribed, within 90 days from this date, which fact shall be certified by at least two of the directors and cashier of the said company.

"Second. Payments of our several subscriptions hereto shall not be required at shorter periods than the following, that is to say: ten per cent. in three days after the said 3000 shares shall have been subscribed and certified; ten per cent at the expiration of each successive quarter during the year 1827; fifteen per cent. on the first day of April, 1828; the like sum on the first day of July, 1828; and the remaining twenty per cent. on the first day of October, 1828.

"Third. Any subscriber anticipating any of the said payments, shall be entitled to a discount on such anticipations, at the rate of six per centum per annum. September 21, 1826. Shares \$100 each."

The cause was tried before the Chief Justice. At the trial, the plaintiffs produced an exemplified copy of their charter, by which it appeared, that they were duly incorporated by the Legislature of the state of New Jersey on the 31st of December, 1824. They also produced the written agreement on which their action was brought, and proved, that it was signed by the defendant, among others, and that he was a subscriber for thirty shares of the stock of the company. The plaintiffs then produced and read in evidence, (after duly proving the same,) a certificate in the following words, viz.:

"We certify that 3000 shares of the stock of the Morris Canal and Banking Company, which was held by the said company on the 21st day of September last, have since that time been *bonâ fide* subscribed. That pursuant to the terms of the new subscription, ten per cent. on the said shares became due in three days. The subscribers are required to make payment thereof to the cashier, at the office of the Canal Company, at No. 30

"Wall-street, on or before Saturday next, the 18th instant. Dated  
"the 14th day of November, 1826."

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(Signed) CADWALADER D. COLDEN, President.  
ROBERT GILCHRIST, Cashier.  
HENRY M'FARLANE, } Directors.  
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It was then shown, that the defendant, having paid the first instalment under the said agreement, had received a certificate thereon, but had refused to pay any of the subsequent instalments, and that the company had continued to labor towards the completion of the canal at all times after the agreement was executed.

The plaintiffs having rested their cause upon this evidence, the defendant moved for a non-suit: first, because no sufficient evidence had been produced to show that the 3000 shares of stock, mentioned in the agreement, had been subscribed for, or that the plaintiffs had agreed to carry on the works of the canal. Secondly, because the agreement was not authorized by the charter.

[The second section of the act, incorporating the plaintiffs, provided that the commissioners for receiving subscriptions to their stock, should open books for that purpose in the State of New Jersey, at such places as they might designate by public advertisements, to be previously inserted for at least three weeks in a public newspaper, printed in Morristown, Newark, and the city of New-York, respectively; and should continue the same open, until the said capital stock shall be subscribed for, or at their discretion close the same, after they should have remained open two days, and again open the same at some other time or times, place or places, giving public notice thereof, as aforesaid: and that the sum of ten per ct. upon each share so subscribed for, should be paid by each subscriber at the time of the subscription," to be paid over to the directors, who were authorized "to call upon the said subscribers for the payment of further instalments, in such sum or sums, at such time or times, and under such forfeiture or forfeitures, as they might deem expedient, until the whole amount of the said shares so subscribed, should have been fully paid." By the seventh section of the act it was further provided, that if at any time

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thereafter, the President and Directors should deem it expedient to increase their capital stock, for the canal, it should be lawful for them to do so, and to obtain subscriptions for the same ; and all stockholders of such additional shares, and their assigns, were thenceforward incorporated into the Company, provided that a preference of subscription was given to actual stockholders, in proportion to the shares they respectively held.]

Thirdly. The only consequence of the non-payment of the instalments by the defendant, was the forfeiture of the shares of stock subscribed for by him, but he was not *personally* liable for the payment of such instalments.

The motion for a non-suit was over ruled by the Chief Justice ; and an exception having been taken to his opinion, the defendant then offered to show, I. that the 3000 shares of stock, mentioned in the agreement, had never been subscribed for at all ; II. that the said shares had never been subscribed for as stated in said certificate, and that the persons, who subscribed the certificate, did so, knowing it to be untrue.

The presiding Judge rejected this evidence, as inadmissible, and charged the jury, that they ought, under the facts of the case, to find a verdict for the plaintiffs. The jury accordingly returned a verdict for \$927.20 in their favor.

The counsel for the defendant having excepted to the decision of the Judge upon the points of evidence, and also to his charge, now moved for a new trial, and *Mr. R. Sedgwick*, in support of the motion, contended,

I. That the plaintiffs ought to have proved the consideration of the contract, declared on, as laid in the declaration that ; being part of the contract. No consideration whatever was proved, except such as might be inferred from the contract itself, and this objection, although applicable to form, is fatal to the right of recovery in the present action.

II. The fair construction of the contract proved, is, that the subscribers were to become stockholders by the agreement itself,

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and by the payment of their subscriptions, and not by means of any shares of stock then in being, and if so, then the agreement was contrary to the charter.

The charter points out the mode of subscribing,—and this, being an original subscription, not according to the directions of the statute, is void. The defendant was to *subscribe* for stock, not *purchase* it, and the price was fixed by law. The sum specified in the agreement is identically the same with that mentioned in the charter, and this coincidence proves, that this was a subscription and not a purchase.

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III. The declaration is founded upon an original subscription, and it must be supported by proof. The subscription was not for an *increase* of stock, but for the *original* stock, and the plaintiffs must prove their case as laid in their declaration.

IV. If the stock in question was previously in existence, then the contract was void, for the Company had no authority to sell stock. They have no powers except such as are granted by their charter, and the incidental powers, which naturally flow from those, which are delegated. They were not authorized to act as brokers of their own stock, either in buying or selling, and their power to make this agreement, cannot be shown from the charter.

V. The evidence offered to show, that the 3000 shares were never subscribed for, according to the conditions of the agreement, ought to have been admitted; so ought that, which was offered to impeach the fairness of the certificate, signed by the President and two of the Directors. If that was fraudulent, then there was no evidence to show, that the condition precedent had been complied with. The subscription itself was a conditional one, and the defendant was not bound, unless the plaintiffs could show, that the 3000 shares of stock held by the Company, had been subscribed for in good faith, within 90 days from the date of the agreement. The fact of such subscription was to be proved by the certificate, and if that was false and fraudulent, then there was no

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proof whatever, to show, that the 3000 shares had been taken up.

For this reason, if for no other, there should be a new trial.

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Mr. D. B. Ogden and Mr. Slosson, contra, for the plaintiffs.

I. At the time the agreement under consideration was made, the Morris Canal Company was in existence, and its operations were begun. They had commenced a canal, and there was an implied obligation to complete it. The very preamble to the agreement shows, the reasons for the new subscription, and the propriety of it. The stock of the Company had all been taken up originally, but a part of it was not *effectually* subscribed for ; and to enable the company to *complete* what they had in good faith begun, the new subscription was opened. Its sole object was, to take up the shares "not *effectually* subscribed for" by an additional subscription. The Company had accidentally become possessed of some of the shares of their own stock ; they were personal property, and might be disposed of for the benefit of all the stockholders. The defendant knowing all the facts of the case, subscribed for a certain number of these shares, and is bound to comply with his contract. He cannot question the correctness of a proceeding to which he was a party, unless he can impute fraud to the plaintiffs. There was a good consideration for his promise, arising out of his rights as a subscriber and stockholder, and he cannot now dispute the validity of his own contract.

II. The defendant cannot be permitted to say that the three thousand shares were not subscribed for, because he has himself paid the first instalment on his own subscription. But if he could, the plaintiffs have still complied with the condition imposed upon them. The three thousand shares were to be subscribed for, it is true, but what was the proof to be, which was to show that fact ? The *certificate* was the proof, and it was to be *conclusive*. The parties to the contract agreed that they would abide by that proof, and they are concluded by it. [Dorr v. The Pacif. Ins. Co. 7 Wheat. R. 581. 20 John. R. 334.]

*Mr. Ogden Hoffman*, in reply.

I. By their charter, the Company could not accept any subscriptions, except according to its provisions. If this is to be considered as a *new* subscription, it is void, because the requisitions of the charter have not been complied with. An ineffectual subscription is no subscription, at all, and that cannot be considered as an effectual subscription which is contrary to the charter. The declaration counts upon a new subscription. No other can be proved under it; and if a new subscription be proved, it can have no binding force upon the defendant, because it is not authorized by the charter.

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II. This agreement was a conditional one, and the plaintiffs, before they can recover, must first show, that the stipulated number of shares has actually been taken up by subscription. In the second place, they must produce the certificate. The defendant is not bound to pay his money upon the production of the certificate alone, but the plaintiffs must show that the three thousand shares have been taken up. There are two conditions precedent to his liability, and both must be complied with. The plaintiffs to show that the stock was subscribed for, produce a certificate which the defendant says is false and fraudulent. He offered to prove it, and his testimony was rejected. This was tantamount to a decision, that the defendant was liable upon the production of the certificate, even if it were forged. A fraudulent certificate has no more validity than a forged one; it proves nothing, and the defendant had a right to impeach it. It does not follow, because the defendant has, under a misapprehension, paid ten per cent., that *therefore* he is bound to pay ninety per cent. more, upon a void contract. The plaintiffs must prove that the three thousand shares were taken up by an effectual subscription; and they must show this by proof, somewhat better than that furnished by a false and fraudulent certificate.

The CHIEF JUSTICE, in delivering the opinion of the Court, observed, that the regularity of the proceedings on the part of the Directors, could not be questioned by the defendant, nor could he now assert that the requisite number of shares was not subscribed

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for before he was called upon for the payment of his subscription. By his own act of subscribing, he admitted the correctness and regularity of all the proceedings in relation to the subscription ; and he could not dispute the authority, on the part of the Company, to make the contract, having himself entered into an agreement with them, whereby their powers were admitted. [*All Saints' Church v. Lovett*, 1 *Hall's R.* p. 191.]

By the terms of the agreement, the three thousand shares of stock held by the Company, were to be taken up by subscription within ninety days from its date ; which fact was to be certified in a particular manner. The plaintiffs produced a certificate, signed in the manner required, and it was, *prima facie*, sufficient evidence of the fact. But the defendant offered to show that the three thousand shares had never been subscribed for at all. This evidence was clearly inadmissible, because he had already admitted the fact by his own acts, in subscribing and paying his first instalment.

He then offered to prove a fraud on the part of the Directors in this ; that they knew, at the time the certificate was granted, that it asserted a fact which did not exist. On the trial, I did not understand the offer as it is now presented, and it may be expedient to grant a new trial, in order to let in the proof of fraud, if any such can be produced. If, in point of fact, the three thousand shares were never subscribed for ; if the certificate was false and fraudulent, and the defendant was ignorant of these facts, he would be absolved from his contract ; and for this reason, a new trial should be granted.

OAKLEY J. The plaintiffs are an incorporated Company in the State of New-Jersey. On the 21st of September, 1826, the defendant signed a subscription for stock in the said Company, which subscription was upon condition, as expressed on its face, that three thousand shares of the stock, then held by the Company, should be *bona fide* subscribed for, within ninety days from its date ; which fact should be certified, by at least two Directors, and the Cashier of the Company.

On the 14th day of November, 1826, the President and Cashier, with two Directors of the Company, signed a certificate, setting forth, that three thousand shares of stock, held by the Company, at the date of the subscription, had been *bonâ fide* subscribed for. The defendant paid the first instalment on the stock, which, according to the terms of the subscription, fell due in three days after the giving of the certificate, but refusing to pay the instalments, subsequently falling due, this action was brought.

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On the trial, the defendant offered to prove that the three thousand shares of stock, mentioned in the subscription had never been subscribed for, as stated in the certificate, and that the persons who subscribed the said certificate, did so, knowing it to be untrue. This evidence was rejected by the Judge, and the jury, under his direction, found a verdict for the plaintiffs.

It is contended by the defendant, that the certificate in question, is not conclusive evidence of the fact of the *bonâ fide* subscription of the three thousand shares of stock, according to the true construction of the agreement signed by him. It appears to me, that the position assumed by him is the true one. The provision, that the fact of the subscription of three thousand shares should be certified by two Directors of the Company, was, I apprehend, inserted in the agreement for the benefit of the subscribers, that they might have some definite information of the fulfilment of the condition, on which they were to become liable. The subscribers might refuse to pay until the certificate was given ; but I think it would be a violent construction of the instrument, to hold that they were bound to pay, in that event, though the certificate might be shown to be false.

If, however, this general position should be doubted, and the certificate is to be considered as conclusive evidence of the fact stated in it, yet I think it cannot be questioned, that the defendant should have been suffered to show that it was falsely and fraudulently made. A fraudulent certificate was a mere nullity. If the defendant is to be considered as stipulating that the act of the plaintiffs, or their agents, should be conclusive on him, he had certainly a right to require that it should be done in good faith.

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The plaintiffs cannot be permitted to acquire any rights by their own fraudulent conduct.

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It was contended on the argument, that the defendant, having paid the first instalment due, and accepted his certificate of stock from the Company, is now too late to object, that the condition of his subscription was not performed. I do not think so. If he made the first payment, relying that the entire subscription had been completed, according to the terms of the agreement, I see no good reason why he may not now inquire into the truth of that fact; and especially why he may not aver and prove, if he has the power to do so, that the plaintiffs had been guilty of a fraud.

*New trial granted.*

[J. A. Johnson, Atty. for the plffs. D. D. Field, Atty. for the deft.]

#### GABRIEL L. LEWIS AND HORATIO G. LEWIS

*versus*

#### WALTER STEVENSON.

A case made can never be turned into a special verdict, or bill of exceptions, unless the right to do so, is reserved at the trial.

Where a verdict has been taken, subject to the opinion of the court upon a case, with the assent of both parties, and the court, in deciding on the case, give a judgment founded on *facts*, rather than questions of law, a new trial will not be granted upon the ground, that one of the parties *supposed* that the case would be decided upon questions of law, and did not, therefore, make his proof as strong before the jury as he might have done.

At the trial of this cause, [*ante p. 63.*] a verdict was taken for the plaintiffs, subject to the opinion of the court, upon a case to be made, and no right was reserved by either party to turn the case into a bill of exceptions, or a special verdict.

The judgment of the court, (which was in favor of the plaintiffs,) was founded principally upon the *fact*, that the defendant had not, in receiving the goods of the mortgagor on pledge, acted with a sufficient degree of caution, and had not made due inquiry as to the right of the party in possession, to pledge property which had been previously conveyed to the plaintiffs.

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*Mr. Barnes* and *Mr. Anthon*, for the defendant, now moved for a new trial, upon the ground of surprise, and if that motion should be denied, then for leave to turn the case into a special verdict, or bill of exceptions. They read an affidavit of the defendant, setting forth, that at the trial neither himself, nor his counsel, supposed that any question of fact, as to his vigilance, in receiving the property, would be raised, and that he could have produced testimony upon that point, which would have satisfied the jury, if he had supposed that such a question was to arise in any stage of the cause. That after the evidence had been closed, it was assumed by the Judge, who tried the cause, and by the counsel for both parties, that the result would depend entirely on questions of law; and that, therefore, the defendant's counsel were willing that a verdict should be taken for the plaintiffs, subject to the opinion of the court, upon a case to be made, not supposing that the judgment of the court, would rest upon a question of fact. The affidavit then stated, that the defendant was taken entirely by surprise, and that, upon a new trial, he could make the question of caution, clear in his favor.

*Mr. W. H. Garrison* and *Mr. O. Hoffman*, contra, for the plaintiffs, read an affidavit of Mr. Garrison, stating that at the trial, after the evidence had been closed, the Chief Justice asked the counsel for both parties, if there was any question of fact to be submitted to the jury: that the defendant's counsel replied, that they did not know that there was, and that they were willing that a verdict should be taken for the plaintiffs, subject to the opinion of the court upon a case. That some conversation was held between the counsel of both parties, as to the question of fraud, and that the Chief Justice then informed them, that if a verdict were taken, subject to the opinion of the court upon a case, that the court

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would then be judges of the *facts*, as well as the law. The affidavit further stated, that the deponent was aware, that if either party should be desirous of removing the cause to a higher tribunal, by writ of error, it was necessary to reserve that right *at the trial*. That the plaintiffs' counsel being willing to abide by the judgment of this court, did not reserve any such right to themselves, and supposed that the judgment here would be final.

Upon these affidavits, the counsel for the defendant contended, I. that they had been taken by surprise : that they did not suppose, that the judgment of the court could turn upon any collateral question of fact, but would be founded, exclusively, upon the questions of law presented by the case. For this reason they asked for a new trial.

II. If the court should deem the first point untenable, then they asked for leave to turn the case into a bill of exceptions, or special verdict. They contended, that this was a matter within the discretion of the court, and that this privilege, under the circumstances of the case, ought not to be denied to the defendant. He was willing to abide by the decision of this court, so long as he supposed that it would depend on questions of law, but as it had turned upon a question of fact, he claimed the right of carrying his whole cause to a higher tribunal. If there was neglect, or fault in not reserving the right at the trial, it was the neglect of counsel and not of the party ; and that the court ought not to visit upon the party the consequences of such a neglect.

The counsel for the plaintiffs replied to both points, and contend-ed, as to the last, that the court had no discretion in the matter ; that they could not now allow the case to be converted into a bill of exceptions or special verdict, without destroying the practice upon which the plaintiffs had relied. That the plaintiffs being aware of the consequence of taking a verdict, subject to the opinion of the court, had concluded themselves at the trial. If the judgment had been ad-verse to them, they would have been without the means of redress. They submitted the whole question of law and fact to the court, and had now a right to claim all the benefit of a final judgment

in their favor. As to evidence, if the defendant had produced more evidence upon the question of negligence, the plaintiffs would have done the same, and the court could not say upon which side the preponderance would be. They insisted, therefore, that the motions ought to be denied.

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*Per Curiam.*—As to the first point, the defendant has no cause of complaint. He might have submitted all questions of fact to the jury, at the trial, if he had been disposed to do so, and there was no attempt to influence him to the contrary. By putting the whole question to the court, he took no higher risk than the plaintiffs did, and can have no greater rights. If the opinion of the court had been adverse to the plaintiffs, upon the question of fraud, whether in fact or in law, or upon any of the other questions presented by the case, their judgment would have been final. The plaintiffs could not have moved again in the matter, but would have been concluded by their own acts. The defendant's rights in these particulars are the same with the plaintiffs, and he has concluded himself, by voluntarily putting all questions of fact, as well as law, to the court. There can be no new trial upon this ground, without manifest injustice to the plaintiffs, and the defendant cannot be permitted now to receive a favor, which the plaintiffs could not have claimed if the judgment had been for the defendant.

Secondly. A case can never be turned into a bill of exceptions, or special verdict, unless the right to do so, is reserved at the trial. In practice, we do not require the party to take *formal* exceptions at the trial; it will be sufficient if he make his objections informally. But if he wishes to bring a writ of error, it must appear upon the face of the case, that he has reserved the right to do so, either in the shape of a special verdict; or a bill of exceptions. The case of *Woolsey v. Camp*, (3 Cow. R. 358,) shows such to be the practice of the Supreme Court, and it is expedient that the same course should be adopted here.

*Motion denied on both points.*

[W. H. Harrison, Atty for the piffs. E. Barnes, Atty for the def'ts.]

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Russell  
v.  
Everett and  
Reese.

**CHARLES POTTER AND CHARLES H. RUSSELL**

*versus*

**CHARLES EVERETT AND GEORGE B. REESE.**

It is a general principle, that if one person pays money to another, under a mistake of fact, without any legal obligation to do so, and without the means of ascertaining the truth; or if he be induced to pay it under false representations, he may recover back the money thus paid, in an action of assumpsit.

The defendants, merchants in England, and the correspondents of the plaintiffs, merchants in America, received orders from the latter to purchase a quantity of goods, on their account, and pay for them by drawing bills on S. Williams, (a banker in London, with whom the plaintiffs had placed funds for that purpose,) at 60 and 90 days' date. The defendants purchase the goods, and drew upon Williams for the amount; but made one of the bills for 500 $\text{\AA}$ , payable at four months. Williams failed before this bill came to maturity, having considerable funds in his hands belonging to the plaintiffs. W. H. R., an agent of the plaintiffs in England, not knowing that the bill at four months was drawn contrary to orders, but believing that the plaintiffs were bound to provide for it, (the defendants having threatened to attach the goods, and funds of the plaintiffs, in England, if it were not paid,) took up the bill without the knowledge, orders, or consent of the plaintiffs. The plaintiffs, as soon as the facts of the case came to their knowledge, protested against the conduct of the defendants, and afterwards brought an action of assumpsit to recover back the amount of the bill. HELD, that they were entitled to recover.

**ASSUMPSIT** to recover back a sum of money, paid by the plaintiffs to the defendants, under an alleged mistake. The declaration was in the common form, and contained the usual counts for money paid, money had and received, &c. Pleas, the general issue, and payment, with notice of set-off.

The cause was tried before Mr. Justice OAKLEY, on the 14th of April, 1829; and, by consent of parties, a verdict was taken for the plaintiffs, subject to the opinion of the court, upon a case to be made.

The evidence in the case was contained, principally, in a deposition given by William Henry Russell, a witness for the

plaintiffs, (taken by consent, *de bene esse*,) and in the correspondence between the parties. Mr. Russell testified, that in the month of July, 1828, he left this country, as the agent of the plaintiffs, for the purpose of purchasing goods for them in England. That on the 24th of October following, Samuel Williams, who was the banker of the plaintiffs in London, and with whom they had extensive dealings, stopped his payments and became bankrupt, having then in his hands funds belonging to the plaintiffs, to an amount exceeding £2500. That the money in Williams' hands, had been deposited there by the plaintiffs, for the purpose of enabling the deponent, and other correspondents of the plaintiffs, to draw bills upon that fund, to pay for goods purchased on their account, whenever the plaintiffs should give orders to that effect.

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That, at the time of Williams' failure, it was well known to him, (the witness,) that several of Potter and Russell's correspondents had drawn bills upon Williams, payable at periods subsequent to the 24th of October;—which bills had been accepted by him, but not being due, were unpaid at that time. That he, (the witness,) believing that *all* the bills accepted by Williams, on account of the plaintiffs, had been *regularly* and *properly* drawn, *in conformity with their orders, but without any knowledge of the fact*, and without the *knowledge*, or *orders* of Potter and Russell, *withdrew all* such bills as had been accepted by Williams on their ostensible account, and *paid* the same for the honor of the plaintiffs, with their funds.

Among the bills so drawn upon, and accepted by Williams, and paid by the witness, was a bill for £500, drawn by the *defendants*, bearing date the 18th of July, 1825, and *payable four months after its date*.

That on the 17th of November following, before the bill for £500 became due, and before the bankruptcy of Williams was known to the *plaintiffs*, he, (the witness,) received a letter from Potter and Russell, informing him that the defendants had overdrawn their account, to the amount of £134; and that the plaintiffs also had a claim upon them for the sum of £15, for other matters; all which the witness was directed to adjust with the defendants.

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That he, (the witness,) supposing that the bill for £500 was correctly drawn by the defendants upon Williams, on the plaintiffs' account, and by their orders, and having no means of ascertaining the contrary, addressed the following letter to Mr. Everett, one of the defendants, as it was not known to him, at the time, that Reese, the other defendant, was connected in business with him.

"Manchester, 17th November, 1825.

"CHARLES EVERETT, Esq.

"Sir,—I have a letter from my friends, Messrs. Potter, Russell & Co., per John Wells, which came to hand this day, in which they say you have overdrawn your account £130, and that they had made a claim on you for £30, for loss on cloths sent without orders ; of which you had agreed to allow £15, making together £145, and ordering me to adjust it immediately.

"By referring to your books, you will see that a bill, drawn by you for account of my friends, £500, falls due 21st, accepted by Samuel Williams. This I have ordered Brown, Janson & Co. to pay for their account, on your paying them this balance, £145 ; but which, if you declined, to let the bill be noted for non-payment. My orders are to settle this ; and as I am only an agent for the house, I must proceed in such a manner as to avoid their censure.

(Signed)                  W.M. H. RUSSELL."

In reply to this communication, the witness received a letter from the defendant, Everett, dated on the 19th of Nov., wherein he stated the balance due the plaintiffs to be £124. 17s. 8d. ; and which he offered to pay, provided the witness would also pay the bill for £500 before mentioned. Everett also threatened the witness, that if this bill were not paid, he would attach the property of the plaintiffs, in England ; and he made inquiries after such property, in London, for the purpose of attaching it.

Under these circumstances, the witness, supposing that the plaintiffs were liable to pay said bill, and fearing that the defendants would attach their funds in England, gave orders to Brown, Janson & Co. to pay the bill for £500, whenever the defendants

should pay the said sum of £124 17s. 8d. This last mentioned sum was accordingly paid by the defendants, and Brown, Janson & Co. then paid the bill for £500, out of funds belonging to the plaintiffs, then in their hands.

The witness also testified, that, at the time said bill of £500 was paid, he had no knowledge of the orders or directions under which the same was drawn by the defendants, but supposed that it was drawn in conformity with the instructions of the plaintiffs ; *and that, had he known the actual orders, under which said bill was drawn, as they afterwards came to his knowledge, he would not, upon any consideration, have paid it.* That he paid the bill upon his own responsibility, under a misapprehension and mistake of facts, and under an impression that the bill was drawn in conformity with the instructions of the plaintiffs ; and that the bill was paid without *their* knowledge or approbation. That the plaintiffs had never directly sanctioned the conduct of the witness in any way ; but they had passed his accounts, when rendered, without any intention, however, of allowing such accounts to bear upon the questions arising upon the payment of said bill. That the plaintiffs had taken the earliest means in their power to regain the amount which they supposed was improperly paid, and had persevered therein, without remission.

The witness also testified, that the defendant, Everett, had dealings with Williams upon other accounts, besides those of the plaintiffs,—and that at the time of the bankruptcy of Williams, and for ten months thereafter, Everett was indebted to Williams, to an amount considerably exceeding that of the said bill. Upon his cross-examination, he stated, that the plaintiffs had, in the hands of Williams, at the time of his failure, funds to the amount of £2700 ; and that there had been two dividends paid on his estate ; one of four shillings, and the other of one shilling on the pound. Those bills, which Williams accepted, and which the deponent paid, were not proved against his estate, but were stricken from his accounts.

The bill for £500 was drawn to pay for goods, shipped by the defendants to the plaintiffs.

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By this witness, the defendants also proved the letters which are hereinafter introduced on their part.

The counsel for the defendants admitted that he had received a notice from the plaintiffs, to produce, at the trial, their letters to the defendants; but stated that they were not in his possession. The plaintiffs then introduced copies of several letters from themselves to the defendants; the first of which was dated the 23d of March, 1825. In this letter, after giving directions to the defendants to purchase certain goods for them, the plaintiffs proceeded as follows: "*In our next, we will advise you as to the source of payment for these orders.*"

On the 8th of April following, the plaintiffs informed the defendants, that they had "lodged a credit of £1500 with Mr. Samuel Williams, *on account of the preceding orders*, and should remit them further very shortly, and probably with some further orders."

The third letter was unimportant; but the fourth, which bore date the 16th of May, 1825, was in the following words: "*Gentlemen,—We have lodged a further credit of £1500 with Mr. Samuel Williams, which you can draw for, on account of our orders, already given, and make your bills at 30 and 60 days.*"

Yours, &c.,      POTTER, RUSSELL & Co."

In their fifth letter, the plaintiffs wrote the defendants thus—  
*"As our orders for pins and plaids cannot be executed, we now say to Mr. Williams, to accept your bills for about £1000, instead of £3000. This, we presume, will be about the amount of the gloves, hosiery, &c., ordered on the 23d of March last; and you will be pleased to advise him accordingly, as we shall make other disposition of the funds."*

The sixth letter, (dated the 26th of May, 1825,) was as follows:—"Since our last letter, of which a duplicate is above, we are in receipt of Mr. Everett's letter of the 22d of April, from which we infer that he will find it difficult to purchase even all the articles ordered on the 23d March last. In order, however, that you may invest to the amount of £1000, (*which sum is subject to your order with Mr. Williams, as we before advised you,*) we

" now authorise you, in case that sum cannot be expended in the  
 " articles named in the order of the 23d of March, to send us the  
 " balance in more hosiery," &c. &c.

The last letter from the plaintiffs to the defendants, was in the following words, viz :

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New-York, 15th Dec. 1825.

Messrs. EVERETT & REESE, London.

" Gentlemen—We received by the Manchester your letter of the  
 " 28th of October, and we have received also a statement of Mr.  
 " Williams' account with us, in which he charges the amount of  
 " your bill for £500, drawn in July, at *four months date*, and payable  
 " the 21st of November, 1825. In drawing on this gentlemen at  
 " this date, you have assumed a responsibility which you should not  
 " have done. We do not know what arrangements Mr. Wm. H.  
 " Russell may have made in regard to retiring the acceptance of  
 " Mr. Williams on our account, due after his failure, or whether  
 " provision will be made for this bill of yours. We can only say  
 " at present, that we shall hold you responsible for any loss that  
 " may arise in consequence of this bill's being drawn at this long  
 " date; for our instructions to you, particularly were, to make  
 " your bills on Mr. Williams at 30 and 60 days, and you will so per-  
 " ceive, on referring to our letter of the 16th of May last. Had  
 " you followed our instructions, your bill would have become due  
 " long before Mr. Williams' failure, and have been paid. Any  
 " loss, therefore, arising from this deviation of our orders, we shall  
 " claim on you for. (Signed) POTTER, RUSSELL & Co."

P. S. " We wish a statement of acc't current, as by our books  
 " there appears a balance of more than £100 overdrawn."

To the reading of this last letter, the counsel for the defendants objected ; but the presiding Judge permitted it to be read, for the purpose of showing that the plaintiffs had not acquiesced in the accounts of the defendants, relative to the bill for £500, but had given notice of their objections as soon as the facts were known.

The plaintiffs then proved the correctness of the copies of their letters, and that the originals were all forwarded at or about the times of their dates, by the regular course of conveyance. One of their clerks also testified, that the first intimation obtained by

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The defendants, on their part, introduced a letter from the plaintiffs to the defendant, Charles Everett, bearing date the 15th of July, 1825, in the following words:—" We beg leave to introduce to your acquaintance the bearer, Mr. W. H. Russell, (brother of our C. H. R.,) who now visits England on commercial pursuits, and to attend particularly to the business of this house, and as our authorized agent. We shall feel particularly obliged by your rendering him such assistance, as he may need in his business in your city, &c.

(Signed) POTTER, RUSSELL & Co."

The defendants also introduced the original letter from William H. Russell, to them, dated November 19th, 1825, which has been already set forth in his deposition, together with another letter from him, under date of November 21st, in the following terms, viz:—" I have requested Messrs. Brown, Janson & Co. to receive from you the balance of £124.17s. 8d., if not already done, and settle the bill of £500. (Signed) Wm. H. RUSSELL."

The defendants also read in evidence a letter from C. Everett to W. H. Russell, bearing date the 19th of November, wherein, after recapitulating the facts of the case, he remarks that the plaintiffs' order for hosiery and gloves, bearing date the 31st of May, was received by the defendants on the 28th of June, and that the bill of £500 was drawn on account of that order. The letter then concluded with the following words:—" I think proper to state these facts, although I cannot but consider the terms in which the demand is made, as very extraordinary, considering that I have been for years in advance to your house, and repeatedly obliged to wait for funds, because Mr. Williams would not accept. The old account with P. & R. remained unsettled until their unjust demands for losses and short measure were

|                                                      |                  |                                                                                    |
|------------------------------------------------------|------------------|------------------------------------------------------------------------------------|
| " arranged. The balance due them now, is - - -       | <b>£45.10</b>    | <b>Aug. Term,<br/>1829.</b>                                                        |
| " The balance, if the bill for £500 is paid, will be |                  |                                                                                    |
| " on new acc't, - - - - -                            | <b>79.7 8</b>    |                                                                                    |
|                                                      | <b>£124.17 8</b> |  |

" This I am ready to pay, if the bill for £500 is paid on the 21st. But it cannot be expected that I should pay, before I am certain that the £500, accepted by a party that has failed, is paid.

" *If the bill for £500 is not paid, I shall, in this case, think myself justified in attaching the property of Messrs. Potter, Russell & Co., wherever it is to be found.*

" I shall pay the bill for £500 on the 21st, and present to Messrs. Brown, Janson & Co., and I have no doubt but they will perform their promise. (Signed) CHARLES EVERETT."

" Enclosed are the accounts current of C. Everett with Potter & Russell, and P. R. & Co., Everett & Reese with Potter, Russell & Co."

The defendants' counsel also introduced copies of the accounts referred to in the last letter, in one of which the bill for £500 was charged under date of Nov. 21st, 1825, and the money received of Brown, Janson & Co. (£375.6s. 4d.) credited under date of November 23d. *All other bills, prior to that in question, were drawn at four months.* These papers closed the evidence on the part of the defendants. The plaintiffs then called one of their clerks, and proved by him that the defendants *never were in advance for the plaintiffs*, and that the latter never gave the former any orders for goods, without furnishing the means of payment at the same time. It was also proved that the defendants, at the time the bill for £500 was drawn, were merchants in company, under the name of Everett & Reese, and the plaintiffs were merchants in company, under the name of Potter, Russell & Co.

The facts of the case being ascertained, the presiding Judge observed, that as the plaintiffs' right of recovery depended upon questions of law, he would recommend that a verdict should be rendered for them, subject to the opinion of the court upon a case

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to be made, either party having leave to turn the same into a bill of exceptions.

A verdict was accordingly taken in favour of the plaintiffs, for the sum of \$2,500, it being understood, that if the judgment of the court should be for the plaintiffs, that the amount of their recovery should be £375.6s. 4d., (being the amount of the bill for £500, after deducting the dividends received from Williams' estate,) together with interest and *exchange*, if the court should deem them entitled to it.

If the court, however, should be of opinion that the action was not well founded, then a judgment of non-suit was to be entered.

The cause was now argued by *Mr. Slosson* for the defendants, and by *J. Prescott Hall* and *Mr. Anthon* for the plaintiffs.

For the defendants it was contended,

I. That no action would lie against the defendants on the ground of a *failure* of consideration, because the plaintiffs having received the goods for which the bill was drawn, received value to that amount, of course. That the only ground upon which the plaintiffs could pretend to rest their claim, was the supposed deviation of orders on the part of the defendants, in drawing the bill at four months instead of sixty days. This demand was founded strictly in *misfeasance*, and the action for money had, or money paid, would not lie. The defendants ought to have been apprised of the nature of the claim, and the action, therefore, should have been special. [*Pal. on Agen.* ch. 1, p. 8, 68.]

II. The settlement made by the agent was a full discharge to the defendants of all liability. The defendants paid to the plaintiffs the balance of their account, and the plaintiffs took up the draft on Williams with their own funds. This was an end of the matter,—Wm. Henry Russell being the general agent of the plaintiffs, and having full power to make the arrangement. [1 *Peters' R.* 290.]

III. As Everett and Reese were indebted to Williams to a greater amount than that of the bill, they would have had a right, in case it had not been taken up by the plaintiffs, to set off the amount of the bill against his claims. By this means they would not have been prejudiced by the bill, and might have claimed the value of the goods of the plaintiffs, to the extent of their present claim.

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IV. If the agent was ignorant of the original instructions given by the plaintiffs to the defendants, the latter did not know him to be so; and the letter of introduction recognized W. H. Russell as the unlimited agent of the plaintiffs, in their general business in England. The defendants, therefore, had a right to presume, that, as he acted with full powers, he acted with full knowledge also.

V. The payment of the bill was voluntary, and no action lies to recover back the amount thus paid, even if the defendants had violated their instructions. But the evidence does not support such a position: the defendants were not restricted to any particular time of drawing, but had a right to exercise their discretion on the subject.

For a part of the fund in Williams' hands, there was an unlimited power to draw; and that part was not exhausted by the bill of £500. The extension of the credit was for the benefit of the plaintiffs; and as all the drafts, prior to the one in question, were at four months, the inference is, that the plaintiffs merely required their bills to be at less than four months, in case a credit for that time could not be obtained. But the whole scope of the case shows, not only an adherence to orders on the part of the defendants, but an acquiescence in their acts on the part of the plaintiffs.

VI. The difference of exchange, at all events, is not to be allowed, and cannot be recovered.

For the plaintiffs it was urged,

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I. That the order given to the defendants, by the plaintiffs, for the purchase of goods, was coupled with a direction to pay for them in a particular manner, out of a specific fund provided by the plaintiffs for that purpose. The defendants, by accepting the order to purchase, were bound to pay for the goods in the manner pointed out by the plaintiffs, and were bound to draw bills upon Williams for that purpose as directed. They could not accept one part of the order, *reject* the other, and thus leave the fund at the risk of the plaintiffs, without some satisfactory reason for so doing. [4 J. R. 103, 104. 3 East. 147. 1 Com. on Con. 246. 230. 238. *Liv. on Agen.* 17. 2 Kent's Com. 484. 13 John. R. 332.]

II. If the defendants were bound to draw bills upon Williams, to pay for the goods, then they were bound to draw them, in all respects, as directed by the plaintiffs. They were directed to draw at 30 and 60 days: they drew at four months, and were, therefore, answerable for all the consequences of disobeying and exceeding their instructions. Those consequences have been the loss of the money; and that loss must be borne by the defendants, who are the culpable party. [*Liv. on Agen.* 2, 3. 25. 1 Com. on Con. p. 6. 236-240. 2 J. R. 45. 3 Term. R. 757. 1 Esp. R. 111. 3 John. Cas. 36. *Rundle v. Pollock.*] ]

III. The plaintiffs were not liable upon the bill for £500, drawn by the defendants upon Williams, and were not bound to take it up. Their agent, under a mistake and misapprehension of facts, and without a full knowledge of the circumstances of the case, but in good faith to his principals, and without negligence, advanced their money to take up the bill. It may be recovered by the plaintiffs of the defendants in this action. [*Archer v. Bank of England, Doug.* 637. *Garland v. Salem Bank,* 9 Mass. R. 408. *Martin v. Morgan,* 3 Moore's Rep. 635. *Clark v. Penney,* 6 Cow. R. 301. *Waite v. Leggett,* 8 Ib. 195. *Robinson v. Anderson, Peake's Cas.* 94. *Cripps v. Reade,* 6 T. R. 606. *Com. on Con. Vol. 2. p. 35.* 2 Bl. Rep. 825. 1 Salk. 22.] ]

**OAKLEY, J.** The plaintiffs, on the 23d of *March*, 1825, remitted to the defendants, merchants, in England, orders for the purchase of a quantity of goods, and informed them that, in their next letter, they would advise them as to the source of payment for the said orders.

On the 8th *April*, 1825, the plaintiffs wrote the defendants, that they had lodged a credit of £1500 with S. Williams, a banker in Loudon, on account of their preceding orders. On the 16th *May*, 1825, they wrote the plaintiffs, that they had lodged a *further* credit with *Williams*, of £1500, which they might draw for, on account of the orders already given, and directed the defendants to draw their bills at 30 and 60 days. On the 23d of *May*, 1825, the plaintiffs wrote to the defendants, that they had given directions to *Williams*, to accept their orders for about £1000, instead of the £3000, and on the 31st *May*, 1825, they also wrote to the defendants, to make purchases for them to the amount of £1000, and that, that sum was in the hands of *Williams*, subject to their order, as they had been before advised.

After the receipt of these letters, and on or about the 18th of *July*, 1825, the defendants made certain purchases of goods for the plaintiffs, and on that day drew a bill, on the said *Williams*, for the sum of £500, payable at *four months*, which was accepted by him. Before this bill became due, and on the 24th of *October*, 1825, *Williams* became a bankrupt. The agent of the plaintiffs, in England, being ignorant of the orders given by them to the defendants, as to the drawing of bills on *Williams*, and supposing that the bill in question, had been correctly drawn by the defendants, and the defendants threatening to attach the property of the plaintiffs, in England, for the amount of the bill, agreed to pay the said bill, and accordingly did pay it to the defendants, after deducting a balance of account due from them to the plaintiffs. This action is brought to recover back the money, thus paid by the agent of the plaintiffs. The declaration is in *assumpsit*, and contains the common money counts.

The ground of the plaintiffs' claim is, that the defendants drew the bill in question in violation of the instructions given them, in consequence of which, the funds placed in the hands of *Williams*,

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for the purpose of meeting the drafts of the defendants, were lost by his bankruptcy :—that their agent paid the bill in ignorance of the fact, that the defendants had violated the orders given them, and that the defendants thus receiving the money without right, and by mistake of the plaintiffs' agent, cannot retain it.

It is well settled as a general principle, that where a man pays money without any legal obligation to do so, under a mistake of fact, and without the means of ascertaining the truth, or if he be induced to pay it under false representations, he may recover it back. (*Garland v. The Salem Bank*, 9 Mass. R. 389. *Martin v. Morgan*, 1 Brod. & Bing. 289.)

In the case of *Martin v. Morgan*, the action was for money had and received. The defendants obtained a check from the firm of B—— & Co. on the plaintiffs, which was *post dated*. Having ascertained that B—— & Co. were insolvent, the defendant presented the check to the plaintiff. The plaintiff paid it, having no funds of the drawer, but expecting to receive them in the course of the day. The plaintiff was ignorant of the insolvency of the drawer, and of the fact that the check had been post dated. The court held that the plaintiff had a right to recover the money thus paid, on the ground that the parties did not deal on equal terms, and that the defendants concealed the circumstances, which, if disclosed, would have prevented the plaintiff from paying the money, and that the plaintiff had thus paid it, without legal obligation, and in ignorance of the true state of facts, which were known to the other party.

The principle of that case, seems to me to apply fully to the one now before us. The defendants here, accepting and acting under the order for the goods, and receiving special directions as to the mode of payment for the same, were bound to adhere strictly to their instructions. Instead of drawing on the fund provided by the plaintiffs, at 30 or 60 days, as directed, they thought proper to give a larger credit to *Williams*, by drawing at 4 months. In consequence of this departure from their instructions, the fund in the hands of *Williams* was lost. Under these circumstances, the plaintiffs were not bound to take up the bill drawn by the defendants, or to indemnify them for having drawn it. It was drawn

on their own responsibility, and at their own risk. Having taken up the bill, and knowing they had drawn it without authority, they induced the agent of the plaintiffs to pay it, by concealing from him the fact, that it had been drawn contrary to their orders, and by threatening to attach their property. It is, therefore, clearly a case in which the parties did not deal on equal terms. The agent of the plaintiffs was kept in ignorance of a fact, which, if he had known it, (as he expressly testifies,) would have prevented his paying the bill. The defendants having obtained the money under such circumstances, and from a party under no legal obligation to pay it, have no right to retain it. The agent, in making payment of the bill, acted without the knowledge, or instructions of the plaintiffs, and the plaintiffs, themselves, were ignorant of the fact, that the bill had been drawn contrary to their orders, until after it was paid. If the payment had been made, under the circumstances, by the plaintiffs themselves, their right to recover the money would have been equally clear; and there must be judgment for the plaintiffs.

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*Judgment for the plaintiffs.*

[David P. Hall, *Att'y for the piffs.* W. Slosson, *Att'y for the defts.*]

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SAMUEL GOULD, JOHN D. DYER AND THOMAS D. DYER

versus

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Although a promise to pay a sum of money, founded upon the forbearing to prosecute a suit, which could not be maintained, is void, for want of consideration; yet, the defendant, in order to avail himself of such a defence, must show conclusively, that the suit, which was the foundation of the promise, could not have been prosecuted to effect.

The plaintiffs, as the holders of certain notes or memorandums, payable to bearer, brought an action of assumpsit, to recover their amount. At the trial, the defendant offered to show, that the notes were given for a consideration, made unlawful by an act of congress; but he offered no evidence to prove that the plaintiffs were acquainted with the consideration for which the notes were given. HELD, that as the act of congress did not make the notes void, the evidence offered by the defendant, to defeat the recovery, was inadmissible.

ASSUMPSIT to recover of the defendant the sum of 100 dollars. The declaration contained separate counts upon *eight* notes or memorandums, of the following tenor: "If James Harrison shall go on board such vessel as I shall provide, I promise to pay to him, security, or bearer, 15 dollars on receipt of the same, being delivered on board. New-York, September 9th, 1828.

(Signed)

JOHN E. ARMSTRONG."

These eight notes were given by the defendant to eight different individuals, four of them being for the sum of *fifteen* dollars each, and the others for *ten* dollars each.

The declaration also contained a count, setting forth that the plaintiffs had commenced an action against the defendant in the Marine Court, for the recovery of the sum of \$100, due from the defendant to the plaintiffs, which was pending at the time of the making of the promises therein set forth. That the defendant, afterwards, on the 1st day of November, 1828, in consideration that the plaintiffs would "cease to prosecute the said action, and stay all further

"proceedings therein, undertook and promised the plaintiffs, to pay them the said sum within one week, next following." It then averred that the plaintiffs did cease to prosecute, &c., and that, although the stipulated time had elapsed, the defendant had not paid the said sum, nor any part thereof, &c. To these counts, there were also added counts for work and labor, goods sold, &c.

To the first eight counts, the defendant filed a general demurrer, and, to the remaining three counts, pleaded the general issue. The defendant, thereupon, entered a *nolle prosequi* upon the counts demurred to, and joined issue upon the others.

At the trial, the plaintiffs proved, that they commenced a suit in the Marine Court, against the defendant, on the notes or memoranda above specified. That the defendant, while the suit was in progress, called on the attorney of the plaintiffs, who showed him the notes. The defendant admitted that they were signed by him, and promised, that if the plaintiffs would cease to prosecute said suit, he would pay them the 100 dollars in the course of the ensuing week. In consequence of this promise, the suit, in the Marine Court, was not further prosecuted.

The counsel for the plaintiffs having rested his cause upon this proof, the defendant moved for a non-suit; but the Chief Justice, before whom the cause was tried, overruled the motion. The defendant then offered to prove, that the notes were given by him, in consideration that the persons named in them, (being American citizens,) should proceed to sea, as seamen, on board an armed vessel belonging to the government of Buenos Ayres: which government was, at the time the notes were given, a belligerent nation, at war with the emperor of Brazil. This evidence being objected to, a verdict was taken for the plaintiffs, subject to the opinion of the court, as to its admissibility, and upon the whole case, either party having leave to turn the same into a special verdict, or bill of exceptions.

*Mr. Cutting*, for the defendant, now contended, I. That the plaintiffs ought to have been non-suited at the trial, there being no consideration to support the promise, contained in the special count, upon which the issue was joined. That promise was founded upon

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an agreement on the part of the plaintiffs, to surcease a suit, in which no recovery could have been had. The notes or memoranda were not negotiable, and were dependent on contingencies: first, the bearer of the note was to go on board; secondly, a vessel was to be procured; and, thirdly, the bearer was himself to be delivered on board. The suit in the Marine Court could not have been sustained, and the discontinuance of it, therefore, did not form any consideration for the defendant's promise. [4 East. 463.]

II. The evidence offered by the defendant, to show the illegality of the transaction, ought to have been admitted. It was material to the issue, and the facts, if proved, would have defeated the action. The very act of engaging the seamen was illegal. They themselves could not have maintained a suit on their notes, and the plaintiffs have no rights which the law can recognize. [*Laws of the U. S.* 20th April, 1818, Sec. 2.—4 Wheat. R. 298, 311.—9 Cranch. R. 365. 6 Wheat. 152. 162. 14 John R. 273. *Gow. on Part.* 168.]

*Mr. Geo. Sullivan, contra,* for the plaintiffs, contended, that as the notes did not, upon their face, show or import any illegality, the holders were to be presumed innocent of their origin, and to have taken them *bonâ fide*, for a valuable consideration. If the defendants had intended to avail themselves of this ground of defence, they should have offered to show that the plaintiffs were acquainted with the purposes, objects, and considerations for which the notes were given. Not having done so, the facts which the defendant offered to show, do not amount to a defence, if proved. The acts of Congress do not make the notes void, although they may punish the offenders: in the hands of an innocent holder, they would be perfectly valid.

But the consideration stated in the special count, was proved at the trial, and it is entirely sufficient to sustain the action. The defendant had the power of judging of his own rights, and if he chose to make the promise, and abandon his defence in the court below, he had a right to do so. But as he has by that means interfered with the plaintiffs' rights, he is bound by his promise.

*Per Curiam.* The motion for a non-suit, in this case, was properly overruled at the trial. It was made before the consideration, for which the notes or memoranda were given, was proved, and their illegality from that source, if they were in fact illegal, could not be known until it was proved by the defendant.

But it is contended, that the plaintiffs are not entitled to recover at all, since the facts are disclosed,—because it is now shown, that the notes were given for an illegal consideration; or that there should be a new trial, at all events, since the defendant offered to prove the facts in relation to the consideration, but was refused permission to do so, by the presiding Judge.

The plaintiffs undoubtedly had a cause of action upon the notes which they held; not in their own names, perhaps,—but, as the bearers or holders of the notes, they could sustain an action in some form or other, to recover their amount.

From the action brought by the plaintiffs, in the Marine Court, the defendant was protected by the agreement. A promise to forbear from prosecuting a suit which could not be maintained, would, of course, be without consideration, and so not binding. But there is nothing to show that the suit in the Marine Court could not have been maintained. The plaintiffs, for all that appears, might have proved an express promise to themselves, which might have sustained their action to the fullest extent. At all events, the contrary is not proved; the defendant has not shown that the action in the Marine Court could not have been maintained, and, of course, there was a sufficient consideration to support his promise of payment, founded upon the forbearance to prosecute the suit in the Marine Court.

As to the illegality of the consideration, founded upon the alleged violation of the acts of congress, there is nothing shown which can connect the plaintiffs with those transactions. They are, apparently, innocent and *bona fide holders* of the notes, for a valuable consideration, and without notice. If this be so, the illegality of the original transaction, cannot affect the notes in their hands. As the acts of congress do not make the notes void, no defence, of this kind, can protect the defendant against the claims

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of an innocent and *bona fide* holder. If the defendant had proved that the plaintiffs were aware of the consideration upon which the notes were given, and had been warned not to trust to them, then his defence, such as it is, might properly have been interposed. But without expressing any opinion upon the question, as to the legality or illegality of the notes, we are of opinion, that the evidence offered by the defendant, at the trial, was inadmissible, and that there must be judgment for the plaintiffs upon the case.

*Judgment for the plaintiffs.*

[F. B. Cutting, Atty. for the deft.]

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MICHAEL SULLIVAN

versus

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DUNCAN P. CAMPBELL, JAMES RENWICK, PHILLIP RHINE-  
LANDER, AND OTHERS.

The plaintiff, with one M'D., entered into an agreement under seal, with the N.Y. Hydraulic Manufacturing and Bridge Co., (a private association under that name,) to construct two bulk-heads, connected with a Canal, which the Company was about to make. This agreement was executed by the defendant, Campbell, as President of that Company, and by Rhinelander, as Treasurer; and was declared to have been entered into "agreeably to their articles of association." In addition to the work which was done, under the contract, the plaintiff, by the direction of Campbell and Rhinelander, performed other labor in excavating the Canal, for which he brought an action of assumpsit against all the associates. The Company was formed under certain articles of association, which provided that persons having dealings with the Company, should not have recourse for their debts against the separate property of its members, but should be considered as giving credit to their joint funds solely; and that the trustees or agents of the Company should have no authority to bind it by any contract, unless it contained a restriction to the effect aforesaid.

The defendants insisted, that the reference in the agreement to the articles of association, was sufficient to charge the plaintiff with notice of their articles, and that he could not, under any circumstances, recover a judgment against the defendants jointly, as they were not partners, and as Campbell and Rhinelander had no power to bind them.

It was, that the plaintiff having performed labor for the benefit of the associates, might maintain an action upon a *quod non meruit*, either against the agents, as having made themselves personally liable, or against the individuals composing the association; and the plaintiff had judgment against all the defendants.

ASSUMPSIT for work and labor performed for the defendants, in digging a certain Canal for them.

The defendants had associated themselves together by certain articles of agreement, under the name of the "New-York Hydraulic, Manufacturing and Bridge Company," for the purpose of establishing and carrying on certain works at or near Kingsbridge. By the 12th section of the articles of association, it was,

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among other things stipulated, that "the stock and property" of the Company should *alone* be responsible for their "debts and "engagements;" and that "no person who should deal with the Company, or to whom they might become in any wise indebted, "should, under any pretence whatever, have recourse against "the separate property of any of the members of said Company, "or against their persons, further than might be necessary to secure the faithful application of their funds to the purposes "for which they were liable." And it was further provided, that "any person accepting any bill, note, check, or *other* contract of the Company, signed by the President, and countersigned by the Treasurer, or dealing with the Company in any other manner whatever, should be considered as thereby giving credit "to their joint stock or property, and as disavowing the right to "have recourse to the person or property of any member. And "all suits, to be brought against the Company, were to be brought "against the President for the time being: it being expressly understood, that all persons dealing with the Company agreed "to these terms, and were bound by them."

By the 18th article, it was provided, that "for the full and perfect information of all persons, who might have dealings with the Company, every instrument or contract by which the Company might be charged or held liable, should declare plainly "and specially," "that payment should be made out of the trust-estate of the Company, and not otherwise,—in such way as that "all persons, having dealings with the Company, might be made "to consent, that they would look for payment to the said trust-estate specially, and not to the individual property of the stockholders." And it was also, by the same article, further provided, "that the directors and trustees should have no authority to "make any contract or engagement which should bind or render "the individual property of any stockholder in any way liable; "and no contract or engagement could be legally made with the directors or trustees, in the name of the Company, unless it contained a limitation, setting forth that payment was to be made "in the manner before specified."

Of the Company so formed, the defendant, Campbell, was President, and Rhinelander, Treasurer. The plaintiff, together with one M'Dermott, had entered into certain articles of agreement, under seal, with the Company, (executed by their said President and Treasurer,) "to build, construct, and complete *two abutments*, "or *bulk-heads*, at Kingsbridge, according to a certain survey or "plan thereof, made by the defendant Renwick." This contract recited that it was made "*agreeably to the articles of association*," and purported to be between "The New-York Hydraulic Manufacturing and Bridge Company," of the one part, and the plaintiff and M'Dermott of the other part.

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The defendants had severally admitted that they were interested in the stock of this Company ; and Campbell and Rhinelander had also admitted that the plaintiff had been employed by them to make a Canal for the association ; and that after he had made some progress in his work, he was stopped by them, for the want of funds belonging to the Company. For the work thus performed upon the canal, this action was brought by the plaintiff.

The cause was tried before Mr. Justice OAKLEY. At the trial, the plaintiff proved by parol, that the work performed upon the canal, had no connexion with the agreement as to the bulk-heads; and he also introduced evidence to support his bill of particulars.

The defendants insisted, I. That the work was, in fact, executed under the written contract. II. That Campbell and Rhinelander had no power to bind their associates by any parol contract, as they were not partners. III. That the plaintiff had notice of the articles of association, having himself made reference to them in his written contract.

As to this last point, there was no evidence, (except that furnished by the written contract,) to show that the plaintiff had ever seen the articles of association, or was aware of their contents. On the contrary, M'Dermott, who was examined as a witness, testified that he was wholly ignorant of the articles, and that they were not exhibited to him at the time the written contract was made.

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Upon this testimony, as the defence rested chiefly on questions of law, the plaintiff, by consent of parties, took a verdict for six hundred and fifty dollars, subject to the opinion of the court upon a case; and if the court should be of opinion that the action was well founded, then the items of the account were to be submitted to referees. If, however, the opinion of the court should be adverse to the plaintiff's claim, in its present form, then a judgment of non-suit was to be entered.

The cause was now argued by *Mr. Thomas L. Wells*, for the plaintiff, and by *Mr. Scott* and *Mr. Anthon*, for the defendants.

For the plaintiff it was contended, I. That the evidence proved that it was not the intention of the parties, that the work upon the canal should form a part of the written agreement.

II. That the members of the Company were to be considered as partners, and as such had received the benefit of the plaintiff's labor. That the articles of association were binding upon its members alone, and could not bind strangers, unless they had full notice of the articles of association, and manifested a consent to be bound by them.

III. That the defendants were bound to give full information to persons dealing with them, as to the extent of their responsibility, and to set it forth in their contracts in such way, that the contracting parties might, without misapprehension, assent to their terms.

The defendants, on the other hand, insisted, I. that they were not liable as partners, there being no agreement between them to share jointly in the profits or loss of their association. No one of the associates had the power of binding the others, or using his credit, or holding out a joint liability as the foundation of credit. They were mere share-holders in a public Company, and as such could not be made personally liable for its debts.

II. That the contract, *under seal*, between the plaintiffs and the defendants, remained in force and unrescinded at the time the work

was done ; consequently no recovery could be had under the declaration in this cause.

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III. The contract was made by the New-York Hydraulic, Manufacturing and Bridge Company, acting according to their articles of association. The action, therefore, should have been brought against the President for the time being, the plaintiff having had notice of the existence of the articles of association.  
[18 J. R. 363.]

IV. M'Dermott should have been joined as plaintiff, the contract, under seal, having been originally made with him as well as Sullivan.

OAKLEY J. The plaintiff, with one *M'Dermott*, entered into an article of agreement with the New-York Hydraulic, Manufacturing and Bridge Company, whereby they agreed to build, for the Company, two abutments, or bulk-heads, at Kingsbridge, connected with the canal, which the Company was about to make. This Company was a private association, under the above style, and the defendants were members of it. The contract with the plaintiff and *M'Dermott* was executed by *Campbell*, as President, and *Rhinelander*, as Treasurer, and is declared to have been entered into agreeably to the articles of association of the said Company. In addition to the work done under the contract, the plaintiff, by the direction of *Campbell* and *Rhinelander*, performed other labor in excavating the canal, and this action is brought to recover compensation for such labor.

The Company was formed under certain articles of association. The 12th section of these articles provides, that no person dealing with the Company, shall have recourse, for any debt or demand, against the separate property of the members of the association, but shall be deemed to have given credit solely to the joint funds of the Company ; and that all-suits against the Company should be brought against the President for the time being. The 18th section provides, that for the information of all persons

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dealing with the Company, any contract made by them, shall distinctly declare, that payment is to be made out of the joint funds of the Company, and not otherwise; and it was also expressly provided by the said section, that the trustees or agents of the Company should have no authority to bind it, by any contract, unless it contained a limitation or restriction that payment was to be made in the manner before specified. It is contended by the defendants, that by the reference in the agreement, entered into by the plaintiff and *M'Dermott*, to the articles of association, the plaintiff is charged with notice of the nature of these articles, and must be considered, in his subsequent contract, for excavating the canal, as acting in reference to them, and as waiving any right to resort for payment to the members of the Company, as individuals. This position is not well founded. The contract in question was by parol, and being attended by no restriction as to the right of the plaintiff to demand payment, is clearly not binding on the Company as such, nor could it be enforced against the joint stock of the Company, by a suit against their President, as directed by the articles of association. The President and Treasurer of the Company, were agents, acting under special and limited powers, as it respected their right to bind the Company, and were bound to conform strictly to them. Not having done so, their act is not binding on their principals.

The plaintiff, however, having performed labor for the benefit of the association, has a clear right to maintain his action, not upon the contract itself, but upon a *quantum meruit*, either against the agents of the Company, as having rendered themselves personally responsible, or against the individuals, composing the association, on the ground that they have received the benefit of the plaintiff's labor. I think it may be maintained against the latter. The plaintiff must be considered as performing his labor without any reference to the nature of the association, and in pursuance of the directions of agents, whose limited or special authority was not known to him. Under such circumstances, the defendants, as members of the association, have reaped the benefit of the plaintiff's labor, and are bound to pay for it.

There must, therefore, be judgment for the plaintiff, subject to a reference to ascertain the value of the labor performed on the canal, as distinguished from that done, under the special contract, for the building of the bulk-heads.

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*Judgment for the plaintiff.*

[Wells and Van Wagenen, *Atty's. for the piffl.* J. Hildreth, *Atty. for the defls.*]

**ARTHUR TAPPAN AND OTHERS**

*versus*

**THOS. A. POWERS, THOS. E. DAVIS AND JONATHAN LAWRENCE.**

In an action upon the case, in the nature of a conspiracy, the declaration alleged a combination among the defendants, for the purpose of defrauding the plaintiffs of certain merchandise, under color of a purchase of it by the defendant, Lawrence, that it might be converted to the benefit of Davis, and described the various acts whereby the fraud was to be perpetrated. Some of these acts were charged to have been done by all the defendants, and others by one or two of them, but all in pursuance of the original combination. Upon demurrer to the declaration, (both general and special,) it was HELD, that whatever is done in pursuance of a fraudulent combination, by any of the parties concerned in it, may be averred to be the act of all. That the conspiracy is only important as it gives a character to the acts of the parties to it, and charges them with the legal consequences of such acts.

In all cases where fraud on the part of the defendant is averred, and damage to the plaintiff as the consequence of it, an action will lie. And where the declaration sets forth a conspiracy, the act of each defendant, done in furtherance of its objects, may be stated to have been done *individually*: and such act, in judgment of law, is the act of all; the *gist* of the action being the *damage* to the plaintiff, and not the conspiracy.

THIS was a special action upon the case against the defendants, for obtaining goods of the plaintiffs by a fraudulent combination, and under false pretences.

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The declaration contained two counts. The first set forth that the plaintiffs, during the time of the wrongs complained of, were partners, dealing in dry goods in the city of New-York, and transacting business under the name of Arthur Tappan & Co. That during the same period, Thomas A. Powers, one of the defendants, was indebted to Thomas E. Davis, another of the defendants, in the sum of \$5000 and upwards, which he was wholly unable to pay, as "Davis well knew, but fraudulently concealed from the plaintiffs and others, for the purposes herein afterwards set forth: for which debt, or a large portion of it, the said Davis held the bond and warrant of attorney of said Powers," that he might "at any time enter a judgment against said Powers upon the same, when he might find it to his interest so to do. That in the month of February, 1828, the said Thomas A. Powers, and the said Thomas E. Davis, became acquainted with the said Jonathan Lawrence, who was then a merchant, dealing in dry goods in the city of New-York, as a jobber and wholesale dealer, possessing a small capital of a few hundred dollars, but extensively known to the dry good merchants in said city, and generally believed to be a man of integrity, and capable of transacting business on a more extensive scale; all which was well known to the said Davis and Powers. That Davis and Powers, with a design to cheat and defraud the plaintiffs, and all others whom they might be able to deceive, and with a design to get property into the hands of Powers, without paying for the same, under such circumstances as that Davis might obtain the same, to satisfy the aforesaid debt due from Powers to Davis, and for other unlawful purposes, in pursuance of a wicked and fraudulent combination for that purpose had and entered into, proposed to the said Jonathan Lawrence, and agreed with him, that two thousand dollars should be raised and placed to the credit of the said Lawrence, in the hands of some person or persons of credit, subject to the orders of said Lawrence, and to give him a credit, and that upon the credit thereof, and such further credit as he might by other means obtain, he, the said Lawrence, should purchase, without disclosing his real connexion with said Powers and Davis, dry goods to the amount of eight

" or ten thousand dollars, *in his own name, of the plaintiff*, and of  
" such others as he might be able to purchase goods of on credit,  
" and for the drafts of said Lawrence on said Powers, to be by  
" him accepted, and whom said Lawrence was to represent as  
" about to become his silent partner, and a man of good credit  
" and property ; and after having made said purchases, said Law-  
" rence was to open a store in said city, in his own name only, but  
" in which store and goods, the said Powers was to be interested,  
" as a silent partner, as was represented to said Lawrence. That,  
" in pursuance of said fraudulent agreement and understanding, a  
" store was taken by Lawrence in his own name, and two thou-  
" sand dollars were raised and placed in the hands of Hicks, Law-  
" rence & Co., a respectable mercantile house, in said city, to  
" whom reference, if necessary, might be made ; and in pursu-  
" ance of said fraudulent design, and in execution of said fraudu-  
" lent understanding, the said Lawrence proceeded to purchase,  
" and did purchase, mostly on credit, about fourteen thousand dol-  
" lars worth of dry goods, for said store, in his own name, and on  
" credit, and for accepted drafts, made on said Powers, whom said  
" Lawrence represented as about to become his silent partner in  
" the dry goods business, and as a responsible man, and in good  
" credit ; all which was in pursuance of said fraudulent agree-  
" ment, and for the purposes aforesaid, and without any intention  
" on the part of said Powers of paying for said goods. And the  
" plaintiffs further say, that on or about the second of April, in the  
" year 1828, in pursuance of said fraudulent agreement, the said  
" Jonathan Lawrence purchased, in his own name, of the plain-  
" tiffs, a large amount of goods, consisting of silks and other dry  
" goods, amounting to the sum of seven hundred and fifty-three  
" dollars and fifty cents, upon which bill of goods, said Lawrence  
" paid one hundred and eighty-eight dollars and thirty-seven cents,  
" leaving due on the same, five hundred and sixty-five dollars and  
" thirteen cents, for the payment of which sum, said Lawrence re-  
" quested four months credit, and offered the acceptance of said  
" Thomas A. Powers therefor, at four months,—he, the said Law-  
" rence, then and there representing that Powers was a responsi-  
" ble man, and about to become his silent partner, and concealing

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" from the knowledge of the plaintiffs, the interest and concern the  
" said Powers and Davis had in said purchases. And the plain-  
" tiffs, relying upon the honesty and integrity of the defendants,  
" delivered said goods to said Lawrence, and took said acceptances  
" for the four months, as requested. And the plaintiffs further say,  
" that in pursuance of said wicked and fraudulent understanding  
" and agreement, said Lawrence, at the time he purchased said  
" goods of the plaintiffs, and obtained said credit, held himself out  
" as the ostensible purchaser, and represented that the goods were  
" to furnish a store, by him opened in said city, on his own account,  
" and in which he had commenced, and was transacting regular  
" business as a dealer in dry goods; whereas, said goods were in  
" truth purchased for the purpose of being secretly and fraudu-  
" lently conveyed to Powers, for the benefit of said Powers and  
" Davis. And the plaintiffs further say, that in pursuance of said  
" fraudulent understanding and design, immediately after said  
" goods were obtained by said Lawrence, in the manner aforesaid,  
" the said Thomas A. Powers, the better to enable said Davis to  
" levy an execution upon, and seize said goods for said debt, due  
" him from said Powers, with the knowledge of said Davis, pro-  
" cured a secret conveyance of all said goods from said Lawrence  
" to him, said Powers, and in pursuance of the same fraudulent  
" designs and understandings, the said Davis, on or about the sixth  
" day of May, eighteen hundred and twenty-eight, caused said  
" goods to be seized and taken to satisfy an execution which he,  
" the said Davis, had taken out against said Powers, upon a judg-  
" ment by him entered, upon said bond and warrant of attorney,  
" and the said goods, the said Davis and Powers, by the aid of said  
" Lawrence, have fraudulently converted to their own use. And  
" the plaintiffs further say, that said Lawrence and Powers now are,  
" and at the time of said purchase were, wholly insolvent and  
" unable to pay for said goods, all which was well known to the  
" said Davis and the defendants, but wholly unknown to the plain-  
" tiffs, and that the said sum, due for said goods, remains wholly un-  
" paid and unsatisfied. And the plaintiffs aver, that the said Davis  
" and Powers, by making use of said Lawrence in manner afore-  
" said, procured said goods from the plaintiffs under a pretence of

" a purchase of the same on credit, without any view or intention  
 " of ever paying for the same, and without any belief or expec-  
 " tation, that said Lawrence could or would ever pay for the same,  
 " but with the intention of converting said goods to their own  
 " use, under the pretence of paying a debt due from said Powers  
 " to said Davis, in which fraudulent scheme said Lawrence was,  
 " by fraud or flattery, or both, made to participate and lend his  
 " aid : whereby the plaintiffs, by the aforesaid wrong doings of  
 " the defendants, have been defrauded and damaged, as they say,  
 " in the sum of one thousand dollars."

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The second count was substantially like the first, but differed in some of its averments, as to the manner in which the goods, obtained by Lawrence, were to be disposed of. It set forth, that the defendants, "with intent to cheat and defraud the plaintiffs, and such others as they might be able to deceive, and with a view of obtaining property by false and fraudulent means, and dividing the same among themselves," entered into the combination described in the first count. That, for the purpose of carrying their designs into effect, it was agreed, that Lawrence should take a store, in Pearl-street, in the city of New-York, and purchase goods in his own name, ostensibly, to the value of ten or fifteen thousand dollars, which were to be placed in said store. That a fictitious credit was to be given to Lawrence, in the manner described in the first count ; but that the connexion of Davis and Powers with him should be kept concealed ; "whereas, it was well understood that the goods, which said Lawrence might obtain and deposit in said store, should be secretly taken therefrom, and *sold at auction, and the money be divided between the defendants,—or the goods otherwise be secretly appropriated to the use of said Davis and Powers, and that the same should never be paid for by them.*"

This count then set forth the purchase of the goods of the plaintiffs, in pursuance of said fraudulent combination, the receiving of the same by Lawrence, at his store, and that they were soon afterwards sent by the defendants secretly to auction, and "sold for cash, and the same converted to their own use, or delivered

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"use," &c.

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Lawrence was defaulted, but Davis and Powers separately appeared by different attorneys, and demurred generally to each count of the declaration.

On the part of Davis, there were also special causes of demurrer assigned. To the first count it was objected:

1. That the plaintiffs, in averring that Powers was indebted to Davis, did not state with the necessary legal precision and certainty the time *when*, and the place *where*, he became so indebted, or the *amount and consideration* of such indebtedness.
2. That the bond and warrant of attorney of Powers, which are averred to have been held by Davis, were not set forth with sufficient particularity.
3. That the first count was argumentative in stating, that Davis held the bond and warrant of attorney of Powers, "*that he might at any time enter a judgment against Powers upon the same, when he might find it for his interest to do so.*"
4. That the averment, that Powers and Davis became acquainted with the defendant, Lawrence, who then was a merchant, &c., is an unnecessary and immaterial averment; and if necessary and material, then, that it is bad, for want of time and place.
5. That the averment of a design on the part of the defendants, to cheat and defraud others besides the plaintiffs, whom they might be able to deceive, is impertinent.
6. That the averment, that two thousand dollars should be raised and placed to the credit of the defendant, Jonathan Lawrence, in the hands of some person or persons of credit, &c., does not set forth the time *when*, and the place *where*, such agreement was made, or the name of the person with whom the money was to be so placed.
7. That the averment, that a store was taken by the defendant, Lawrence, does not set forth the time when it was taken, or the place where it was situated.
8. That the averment, that two thousand dollars were placed in the hands of Hicks, Lawrence & Co., does not set forth the names of the individuals composing the firm.
9. That the averment setting forth the purchases, dealings and representations of the defendant, Lawrence, from, with and to persons other than the plaintiffs,

is impertinent. 10. That the setting forth of the motives, which influenced the defendant, Powers, in procuring a conveyance of the goods from Lawrence, is argumentative and bad. 11. That the averment, that the goods were caused to be seized under execution, does not state the day, nor place of seizure. 12. That the averment, that the defendant, Lawrence, was made to participate in the alleged fraudulent scheme, "*by fraud or flattery, or both,*" is bad for uncertainty, and because it is immaterial to the plaintiffs' claim what means were used, to procure Lawrence's participation in the scheme.

To the second count it was objected, 1. That the time when the agreement between the defendants and Lawrence was made, is not set forth with sufficient certainty. 2. That the averment of an intent to cheat and defraud others, besides the plaintiffs, is impertinent. 3. That the averment, that ten or fifteen thousand dollars worth of goods were to be purchased, is uncertain and impertinent. 4. That the averment, that it was *agreed*, that it should not be known, that Davis was in any way concerned in said purchases, or the business of said store, does not state when and where such agreement was made. 5. That the averment, that the goods should be secretly taken from said store, and sold at auction, and the money divided between the defendants, or that the goods should otherwise be secretly disposed of, is bad, because it is in the alternative, and does not state time and place. 6. That the averment, that Lawrence took a store in his own name, and that the defendants raised the sum of two thousand dollars, and placed, the same in the hands of Hicks, Lawrence & Co., does not state when and where the said store was taken, or when and where the money was raised, or the names of the persons, who composed the said firm of Hicks, Lawrence & Co., and is without a venue. 7. That the averment, that Lawrence proceeded to hold himself out as a man safely to be trusted, and to make large purchases of dry goods, on credit, in his own name, ostensibly, concealing the interest of the said Davis, without averring of whom the purchases were made, is uncertain and impertinent. 8. That the averment, that the said goods were secretly sent to auction, and

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sold for cash, and the same converted to the defendants' use, or delivered to said Davis and Powers, and by them converted to their use, does not state either time or place, and being in the alternative, is bad for uncertainty. 9. That the averment, that Lawrence and Powers were then both insolvent, and wholly unable to pay for said goods, does not state time particularly, and is without a venue. 10. That the averment, that the said goods were bought with a view of being converted into cash, and the avails divided among the defendants, or of being appropriated by said Davis and Powers to their own use, being in the alternative, is bad for uncertainty. 11. That the negative averment, stating what the goods were not bought for, is impertinent.

The cause was argued by *Mr. D. B. Tallmadge*, and *Mr. Hugh Maxwell* for Davis; by *Mr. J. Anthon* for Powers, and by *Mr. George Goddard* and *Mr. S. P. Staples* for the plaintiffs.

*Mr. Tallmadge* observed, that he should not enter upon an argument, to prove the special causes of demurrer to be well taken, as they were set forth with sufficient precision to explain themselves. He insisted, however, that the judgment of Davis against Powers, was not well set out. I. Because the facts in the first count of the declaration, do not show a case of fraud between Powers and Lawrence, independent of their connexion with Davis.

They are charged as *partners in fact*: and although Powers is represented as a dormant partner, that cannot make their transactions fraudulent, especially in this case, where Powers accepts a draft for the goods. It is, therefore, their connexion with Davis and his *judgment*, which makes them parties to the fraud; for without that judgment, there would be no fraud. The judgment and execution, therefore, are the very *gist* of the action, and should be set forth, with the name of the court where the judgment was obtained.

If a plea aver, that the defendant was discharged by *due course of law*, without showing how he was discharged, it is bad in substance: [2 *John. R.* 437.] and if a party plead a *judgment*, he must show in what court it was obtained. [2 *Salk.* 517.] An al-

legation, that the plaintiff was compelled to pay by a court of *competent jurisdiction*, without stating *what* court, would be bad on general demurrer. [1 Wend. R. 207.]

If this be an action for giving a false credit to Lawrence, or obtaining one for him, then Davis is not liable, because he has not done any thing to give Lawrence a false credit. Davis was a *bonâ fide* creditor of Powers, who was indebted to him beyond all doubt. If the name of Davis were withdrawn from the first count, then there would not be any thing left, to show fraud against Lawrence and Powers. Take away Davis and his judgment, and there would be nothing left, wherewith to charge the other two. The manner, therefore, in which the judgment and execution were to be made use of, lies at the very foundation of the first count ; and they should have been set out with precision and accuracy.

II. But if the objections to the first count, should not be deemed sufficient to sustain the demurrer, there are others, which must prove fatal to the declaration.

The facts set forth in the second count, establish a clear case of partnership between *all* the defendants, Davis and Powers being silent partners. If this be so, then the action is misconceived ; it should have been *assumpsit*, founded on the draft accepted by Powers. But no action upon the draft would lie, until the time of credit had expired, and the time of credit cannot be ascertained by the declaration, because the time of *purchase* is not mentioned.

If it be contended, that the second count is but an action of *assumpsit* against the partners, then the declaration is bad, because a count in *assumpsit*, cannot be joined with a count for tort. There is nothing fraudulent in having a secret partner, because the plaintiffs have a better security than that, which they agreed for. [Penny v. Martin, 2 John. Ch. R. 566.] In the case cited, there was a suit and judgment against *two* : afterwards the plaintiff discovered that a *third* person was a secret partner, and filed a bill against him. The Chancellor said, there was neither mistake nor *fraud* here, and refused relief.

III. There is another test, which may be applied to this decla-

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ration. The facts disclosed by the first count, will warrant an action of *trotor*; those in the second count assumpsit; a *special action on the case*, therefore, will not lie. [1 Chit. Plead. 84.] If the declaration contain an averment in the alternative, the defendant has a right to select that, which is least favorable to the plaintiffs.

At a very early period, *specific forms* of actions were provided for such injuries, as had then most usually occurred; and Bracton observing on the original writs, *on which our actions are founded*, declares them to be *fixed and immutable*. The ancient forms of actions are collected in *Registrum Brevium*. At common law, where no form could be found in the register adapted to the nature of the plaintiff's case, he was allowed to bring a *special action on his own case*, and writs were framed accordingly.

Where the prescribed form of action is to be found in the register, the proceedings should not materially vary from it, unless in those cases, where another form of action has long been sanctioned by usage; for the courts have considered it of the greatest importance to observe the boundaries of the different actions, not only in respect of their being most logically framed, and best adapted to the nature of each particular case, but also in order, that causes may not be brought into court confusedly and *immediately*, and that the record may at once clearly ascertain the matter in dispute.

In this case, the plaintiffs have remedies by forms of action fixed, prescribed, and well known to the law. They are not driven to invention by any necessity, and this special action, therefore, will not lie.

*Mr. George Goddard*, for the plaintiffs.

The special causes of demurrer, assigned in this case, are all to such parts of the declaration as are merely matter of inducement, or aggravation; none of them are applicable to the statement of the *cause of action*.

The cause of action is the damage to the plaintiffs, in depriving them of their property; and the narration, which precedes the averment, that the goods were obtained, is merely a summary of some

of the means, by which the fraud was committed, and is matter of inducement: being useful to a clear statement and understanding of the case, but not material to sustain the plaintiff's action. So the averments, which follow the statement of the cause of action, are matter of aggravation, proof of which might enhance the damages, but if not proved, the action might still be sustained.

[*As to what is inducement, see 1 Chitty Pl. 292. Archbold Pl. 93. Stephen 311. Yelv. 17, 18. Alsop v. Sitwell.*]

It is well settled, that matters of inducement, or aggravation, do not require certainty of time, place, or other circumstances. [1 Chitty Pl. 282. 1 Plow. R. 191. Stephen 374. 5 Com. Dig. Pleader C. 20. 31.]

The objects of certainty, are to give the other party notice of the claims, and to preclude a second action for the same cause. Both are attained, if the strict rules in regard to certainty, are confined to the statement of the cause of action.

The plaintiffs are also excused from greater particularity, from the consideration, that the facts are necessarily more within the knowledge of the defendants. [Stephen 372.] The charge is fraud; and it cannot be expected, that the plaintiffs should be able to specify the time, place, and attendant circumstances of each act of fraud, which, to accomplish its object, must be studiously concealed from the knowledge of those against whom it is directed. For the purposes of this argument, the fraud is admitted. The plaintiffs can state the result of the defendants' acts, as regards them; but not the means by which it was produced.

The rule, requiring certainty of time and place, is wholly technical in transitory actions, and as it exists at present, is of no use, but rather enables one party to mislead the other. But the special causes of demurrer, are not true in point of fact. As to the place, the mention of it in the margin is sufficient. [9 Johns. R. 81. *Slate v. Port.* 13 Ib. 449. 3 P. R. 387. Archbold 89. 1 Dunlap's Pract. 247.] And in the body of the declaration, the place is frequently stated, and there is sufficient connexion between the parts in which it is not stated, and those in which it is, by reference from one to the other, to make it available for the whole. This last remark is likewise applicable to the statement of time.

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Those parts of the declaration, which are objected to, as argumentative, are not so within the proper meaning of this term, as applied to pleading ; to set forth the motives of the parties is not argumentative, and is objectionable only as being surplusage. Argumentative pleading is leaving that to be made out by inference, which should be stated positively. [Stephen 384.]

Some of the causes of demurrer were, that the averments objected to are impertinent. If by impertinence is meant scandal, which is its true meaning, this is not the mode to object to it ; but it should have been referred to the court, or a Judge, to be struck from the declaration ; but if the pleader means, that they are not relevant to the case, then they are merely surplusage, and not the proper subjects of demurrer.

The declaration is good in substance, as well as in form. This is *an action on the case* ; the name, history and definition of which, show that the declaration may always be adapted to the injury. The definition of it is, "where a party sues for *damages* for any wrongs, or cause of action to which *covenant* or *trespass* will not apply." [Stephen 15.] Every wrong has a remedy, and an appropriate remedy, and no other form of action, or mode of declaring, would be more appropriate to this case, than the one adopted. Even the right to make new writs, "according to the case," if necessary, is provided by statute 1. R. L. p. 80., sec. 6. But this mode of declaring is supported by precedent. [3 Pick. R. 33. *Levermore & Co. v. Herschell*, 2 Day, 205. *Gardner v. Preston, et al.*]

That the plaintiffs have other remedies is no objection to this. There are few cases, which do not admit of more than one form of action, and in which it is not at the election of the party to adopt either.

It is said the defendants should have been sued as partners ; this is not correct, unless every fraudulent combination constitutes the parties, combining partners, and exempts them from all liability, except as partners ; and this would be wholly to confound torts and contracts, and would be equally applicable to all other cases of joint fraud, by which money or goods are obtained. Though the defendants *might* have been sued as partners, it does not follow

that they *must* be so sued. Persons who are acknowledged as partners, may jointly be guilty of a fraud, and liable in tort, and the privilege of waiving it, rests with the party injured. The defendants could not have been proceeded against, as partners, until the credit given had expired, when it might be too late.

The same remarks furnish an answer to the argument, that the action should have been *trover*, and a further answer to both of these modes of proceeding, is, that in these the plaintiffs would be limited to the value of the property, as the rule of damages; whereas in the present action, the jury would be authorized to give exemplary damages, to compensate the plaintiffs for their trouble and expenses, and furnish a salutary lesson to the defendants and others.

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*Mr. Staples* on the same side, entered into a general and minute examination of the special causes of demurrer, supporting the ground taken by Mr. Goddard. He insisted, that they were all applicable, either to matters of inducement, or matters of aggravation; neither of which, are the subjects of demurrer. That matters of inducement are not traversable, and need not have certainty, either of time, or place; and an issue tendered upon them, would be wholly immaterial. If there was any thing impertinent in the declaration, or if there was surplusage, it might be stricken out on motion to the court; but such defects cannot be taken advantage of in this way. The *gist* of this action is fraud, and the special causes of demurrer do not meet the *cause of action*. They are not, therefore, well taken.

II. But there is a grave question raised by the general demurrer, (said Mr. S.,) which goes to the foundation of this claim, and it is seriously contended, that the declaration does not disclose any cause of action against the defendants.

It is a maxim in the law, that for every wrong there is a remedy, and if the plaintiff state the subject of his wrong in proper form, the courts will not fail to give him relief. It was said by Lord Kenyon, in *Paisley v. Freeman*, [3 T. R. 64,] that laws are best administered, when they are made to enforce moral and social

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duties. And it would be a reproach upon our jurisprudence, if a clear case of fraud, could not be reached by any remedy known to the laws.

This is an action on the case, in the nature of an action for a conspiracy, and fraud and damage are the grounds upon which it rests. "An action on the case lies, (it is said,) when a man does any *deceit* to the *damage* of another;" [*Paisley v. Freeman*,] and if this be a correct proposition, the principal subject of inquiry would be, whether any damage has been done in this case, to the plaintiffs, by the *deceit* of the defendants.

There is a plain distinction between a writ of conspiracy and an action on the case, in the *nature* of a conspiracy. [1 *Saund.* 230. *Skinner v. Gunton*, and note 4.]

*Mr. Maxwell*, in reply for Davis, said he should rely upon the general demurrer alone; for although the special causes might all be well taken, yet as the principles involved in the case were important, the general demurrer would determine whether the action could be maintained.

The *conspiracy* alluded to in the declaration, may be laid entirely out of view, because the case does not contain principles in any way analogous to those upon which such actions rest.

The declaration when stripped of its unnecessary verbiage and peculiar phraseology, and independent of the allegations of conspiracy, charges nothing against Davis, but the fact, that he concealed his judgment from the plaintiffs, and then levied upon the goods of Lawrence. Does this, in itself, furnish a substantive ground of action against him? The judgment held by him, was *bona fide*, and he was not bound to communicate the facts, relating to his own private affairs, to any body. View it as you will, and it amounts at most, but to an act of *non-feasance*, and the books tell us, in what cases an action for *non-feasance* will lie. This, certainly, is not one of them. [*Chit. Plea.* vol. 1. 368, *Elsie v. Gatewood*, 5 *T. R.* 143.]

The declaration charges no act of *misfeasance* against Davis; and it is not pretended, but that Powers actually owed him the full amount of his judgment, and there is no allegation that the

debt was fraudulently created. If it be intended to charge the defendants with a false representation, then the charge should be set out in the declaration, specifically and correctly, that they may know what it is that is alleged against them. [*Paisley v. Freeman*, 3. T. R. 64. 12. East. 635.]

The allegation of conspiracy is mere surplusage, and the plaintiffs cannot, by that, charge Davis, unless they allege fraud against him expressly. [3. Con. Rep. 418. *Otis v. Raymond*. *Young v. Scovell*, 8. John. R. 25.]

In all cases of tort, the damage must be the legal consequence of the acts charged. [*Butler v. Kent*, 19 John. R. 238.] In this case, Davis has not caused any injury to the plaintiffs by his acts: nor was the injury sustained by them, the natural or legitimate consequence of his conduct. In the case of *Jones v. Baker*, [7 Cow. Rep. 479,] there were averments of certain facts, or rather of certain acts done by the defendants, from which the plaintiffs sustained an injury. The action did not rest upon averments relative to conspiracy, and the court will find, in the opinion of the Chief Justice, proper distinctions to be observed in actions upon the case. [See also 1. *Saund.* 230, and the note.] The gist of the action, in *Jones v. Baker*, was the arresting of the defendant in an improper manner, and not the conspiracy, and the averments, relative to the latter, were mere surplusage, intended as matter of aggravation.

If the defendants are *all* to be made liable in an action of this nature, facts against all should be charged, and you cannot connect one with the other, by imputing to him a fraudulent design, unaccompanied by fraudulent acts. A mere constructive fraud, cannot be made the subject of an action, but each individual is answerable for what he *does*, in contravention of the rights of another.

In the case of *Livermore v. Herschell*, 3 Pickering, p. 33,) the declaration expressly charged that the false affirmation was made by the *three* defendants; and WILDE J. says that the conspiracy was matter of aggravation merely. So in the case of *Gardner v. Preston*, (2 Day, p. 205,) the acts complained of, are charged against *all* the defendants, and they are not connected by implication merely.

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But here, an attempt is made to charge Davis for *not* doing an act which he was under no obligation, legal or moral, to do. It would be extremely unsafe to allow any plaintiff to sustain an action for consequential damages merely, without compelling him to point out against each of the parties charged, the facts to be proved against *him*. Here are general allegations merely, of a corrupt *design*, without any specifications of the acts done by each to accomplish the design. By blending the parties together, and by the free use of the charge of a fraudulent *intent*, the plaintiffs seek to confound the innocent with the guilty, and make good their loss from the pockets of those who never had any connexion with them.

The action is not founded upon any correct principles of legal right, and the declaration cannot be supported.

*Mr. Anthon* for Powers.

The declaration in this case, is *sui generis*; it is without model and without precedent. If the defendants take issue upon the facts charged in the declaration, they will go before the jury without any knowledge of what each one is called upon to answer. We demur to the declaration, for the purpose of causing such lines of legal discrimination to be drawn, as shall enable us to go before the jury with some knowledge of the charges against us. As the charges now stand, they establish no illegal act against any *one* of the defendants; and we ask to know whether, in an action like this, the plaintiffs' case can be made stronger, by merely connecting the defendants together.

The declaration alleges that Powers was indebted to Davis; that these two became acquainted with Lawrence, and made the propositions which are recited. It appears that a fund was to be raised for the common benefit of all the defendants, and that Lawrence was to be treated as a man entitled to confidence. If these facts be true, what do they prove? Not *fraud*, but the mere common case of establishing an artificial credit. The plaintiffs had the power of inquiry, and if they trusted to the fund imprudently, it was at their own peril. If they trusted to Lawrence, it was from their own credulity; for there is not a single allegation

that either Davis or Powers ever made any representation to the plaintiffs, or did any act in direct reference to them, which can be made the cause of complaint against them. The first charge is, that Powers, one of the defendants, was indebted to Davis, and that he was unable to pay this debt. That Davis well knew this fact, but *fraudulently concealed* it from the plaintiffs.

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Can it be seriously pretended, that if Powers was the debtor of Davis, the latter was bound, either legally or morally, to communicate that fact to the plaintiffs? They were strangers to each other, in no way connected, and not in any habits of intercourse. How could Davis be called upon to communicate his private affairs to Arthur Tappan & Co., to whom he was unknown? The very statement of the proposition proves its absurdity, and shows that there could be no fraud in withholding a knowledge of the facts from the plaintiffs. It is an abuse of terms to call it a concealment, for that implies an obligation to communicate, whereas there was nothing of the kind here.

The next allegation is, that Davis held a bond and warrant of attorney against Powers, upon which he intended to enter up a judgment whenever he should find it for his interest to do so. If the bond were for a *bonâ fide* debt, and there is no allegation to the contrary of this, where was the impropriety of entering up the judgment? It does not enhance the wrong, that Davis was to delay that act, until prompted by his interest to do it, for he certainly would not, with common understanding, do it against his interest. There is, then, no fraud or wrong in this charge.

The next charge is, that by a fraudulent combination, Lawrence was to be induced to procure goods for the express purpose of allowing Davis to levy an execution, to be obtained under the judgment, upon them; but in anticipation of this, the sum of two thousand dollars were to be raised by Davis and Powers, to be at the disposal of Lawrence. As Powers is alleged to be insolvent, Davis, of course, was to advance \$2000, for the purpose of securing a debt of \$5000, and all this was to be done by Lawrence, for the accommodation of Davis, without any apparent benefit to himself! This may be called an absurdity in terms.

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But no act is charged thus far upon the defendants ; a corrupt agreement merely is alleged. Afterwards, *Lawrence* went to the plaintiffs, and represented to them that Powers was a responsible man, and about to become his silent partner. The plaintiffs then trusted to the representation of *Lawrence*, and gave him credit, but no act of any kind is charged against Powers or Davis. The declaration alleges, however, that the plaintiffs, "relying upon "the honesty and integrity of the *defendants*," delivered the goods to *Lawrence*, and took the acceptance of Powers. How could they rely upon the honesty of the *defendants*, when they, up to this period, as the declaration itself shows, had no knowledge of *Davis* whatever ? And besides this, the declaration then goes on to say, that *Lawrence held himself out* as the ostensible purchaser, and represented that the goods were to furnish a store for him. How does this correspond with the allegation, that the plaintiffs trusted to the honesty of *Davis* and Powers ? It is evident that they trusted to *Lawrence* alone,—and the facts show a mere case of a common speculator, who purchased goods, by his own representations, without any connexion with *Davis*.

If Powers gave his acceptance to the plaintiffs, through the intervention of *Lawrence*, he is bound by it, and you cannot charge him in a form of action, new and unusual, for the purpose of connecting him with a stranger. He and *Lawrence* are already bound for the value of the goods, by *contract*, and cannot be made answerable for a fraud in the same matter, the amount of which does not exceed the debt.

II. There is another objection to this action : It is an attempt to evade the statute of frauds. That statute declares, that no man shall be answerable for the debt or default of another, unless he manifests his consent to be thus answerable, by a contract in writing.

The object of the statute was to save third persons from the dangers of vague and uncertain oral testimony ; and it called upon the plaintiffs to produce the defendants' written promise. Here is a debt created by *Lawrence*. If *Davis* intended to answer for it, where is his promise ? If the plaintiffs relied upon *Davis*,

when they gave credit, where is the evidence of their confidence in him?

The case of *Paisley and Freeman* sets the utmost bound to which the courts will go in cases of this nature, and all the cases; since that decision, are in our favor.

In *Haycroft v. Creesy*, [2 East. 103,] an attempt was made to extend the doctrine of *Paisley and Freeman*, by making the defendant liable for the consequences of his acts, without charging a *scienter* upon him. But the court refused to go beyond their original limits, which have always been considered as approaching the very bounds of prudence. Lord Elden [6 Ves. 186] even condemned the doctrine of *Paisley v. Freeman*; and our Supreme Court, in *Ward v. Center*, [3 John. R. 280,] thought that case an attempt to evade the statue of frauds.

I admit that in *Upton v. Vail*, [6 Johns. R. 181,] our courts have, in some measure, sanctioned the doctrine of *Paisley v. Freeman*; but that case has always been limited to its own peculiar facts. It does not establish a principle, which can comprehend all cases, of constructive fraud.

A case analogous to the present, was once decided, at Nisi Prius, in this city, against the plaintiffs' right of action. I allude to the case of *Rumsey v. Lovell*. In that case, Lovell had a bond and warrant of attorney against a certain debtor of his. He represented that debtor, to the plaintiff, as a man of responsibility, and he thereby obtained a quantity of goods, upon which Lovell levied an execution, obtained his debt, and his debtor became insolvent. Upon the trial of the cause, the plaintiff failed to recover, as it did not appear that Lovell had any knowledge of the true state of his debtor's affairs.

This ground is to be trenched upon with caution, and we are not lightly to charge acts of fraud, where none was intended.

Chief Justice MARSHALL says, (7 Cranch. 69,) that it may be doubted whether the objections of Grose J. to the decision in the case of *Paisley v. Freeman*, have ever been answered. And it may be laid down as an axiom, that in no case can A. be made liable for the debt of B., except where he has given his writing, or made false representations of his credit *scienter*.

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Here, no fraudulent act is charged against Davis, for he had a right to collect his debt of Powers. He made no representations, true or false, and his judgment was *bona fide*. There is no allegation of any active or efficient agency on his part, and it does not appear that he even gave advice or counsel to Lawrence. The facts relative to his judgment, he was not bound to disclose, and there is no legal ground upon which this action can be supported. The attempt is to extend a class of cases which have already gone as far as it is prudent to go, and I ask the court, if they are prepared to advance one step beyond the limits of *Paisley v. Freeman*?

OAKLEY J. The first count of the declaration in this cause, states, in substance, that *Powers* being indebted to *Davis*, in a large sum of money, which he was unable to pay, and for which a bond and warrant of attorney, to confess a judgment thereon, had been executed to *Davis*; a combination was entered into by all the defendants, with the intent to defraud the plaintiffs, and other merchants in the city of New-York, and to get property into the hands of *Powers*, with the view that *Davis* might seize it for the satisfaction of his said debt. That, as a part of the said fraudulent plan, the sum of \$2000 should be raised, and placed to the credit of *Lawrence*, in the hands of some person of respectability, in order to give the said *Lawrence* credit; that *Lawrence*, on the credit thus to be obtained, should purchase, in his own name, goods to a large amount, of the plaintiffs and others, without disclosing his real connexion with *Powers* and *Davis*, which purchases were to be made on credit, and for the drafts of *Lawrence* on *Powers*, whom *Lawrence* was to represent as a man of property, and about to become his silent partner in business; and, that after such purchase was made, *Lawrence* should open a store, in his own name, but in which *Powers* was to be a silent partner. The declaration then avers, that in pursuance of the said fraudulent combination, a store was taken by *Lawrence*, the said \$2000 were raised and placed in the hands of a certain mercantile house, to which reference might be made to give credit to *Lawrence*: that *Lawrence* purchased for his said store, in his own name, and mostly on cre-

dit, and for his drafts on *Powers*, a large amount of dry goods, representing *Powers* to be a man of respectability, and about to become his partner; that, also in pursuance of the said fraudulent combination, *Lawrence* purchased of the plaintiffs a quantity of goods, in his own name, paid a small part of the purchase money, in cash, and gave the acceptance of *Powers*, at four months, for the balance, representing to the plaintiffs that *Powers* was a man of respectability, and about to become his partner; that *Lawrence* also represented to the plaintiffs that said goods were intended to be placed in his store, for the purpose of regular business as a dealer in dry goods; that, in truth, they were purchased with the intent of carrying them secretly to *Powers*, for the benefit of himself and *Davis*; that the same were, accordingly, immediately after they were purchased, conveyed to *Powers*, to enable *Davis* to seize them on execution, and that the same were levied upon by *Davis*, by virtue of an execution, taken out by him on a judgment entered on his bond and warrant of attorney, and were thus converted to the use of the said *Powers* and *Davis*, and that *Lawrence* and *Powers* were, at the time of the purchase of the goods of the plaintiffs, actually insolvent, and known to *Davis* to be so; and that the goods in question have never been paid for, &c.

The second count in the declaration, is substantially like the first, varying only in the averment, that the fraudulent combination was entered into for the purpose of obtaining the property, and secretly selling the same at auction, and dividing the proceeds among themselves, and that the same was so sold at auction, and converted to the use of the defendants, or delivered to the said *Davis* and *Powers*, and converted by them to their use.

To this declaration, *Davis* and *Powers* demurred separately, *Powers* assigning various causes of demurrer. *Lawrence* has suffered judgment to pass against him by default.

I am not able to perceive any foundation for this demurrer. This is an action on the case, in the nature of a conspiracy. The conspiracy is only important, inasmuch as it gives character to the individual acts of the parties to it, and charges all with the legal consequences of such acts. It is well settled, that whatever is done in pursuance of a fraudulent combination, by any of

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the parties concerned in it, may be averred to be the act of all. In the present case, the declaration avers a fraudulent combination among the defendants, for the purpose of cheating the plaintiffs, and sets forth various acts, as the means by which the fraud was perpetrated. Some of these acts are charged to have been done directly by all the defendants, and others by one or two of them, but all in pursuance of the original combination. It cannot be doubted, that if the declaration had averred that all the defendants used the fraudulent means of obtaining the plaintiffs' property, which are charged against *Lawrence*, that such an averment would be supported by proof, that they were used by him in pursuance of a plan concerted among them all; and it seems to me equally clear, that where the declaration sets forth a conspiracy, the act of each defendant, done in furtherance of its objects, may be stated to be done individually; and that such act, in judgment of law, is the act of all. This appears to be the well-established doctrine on this subject. [*Jones v. Baker*, 7 *Cow. R.* 445. *Gardner v. Preston*, 2 *Day's R.* 205. *Livermore v. Herschell*, 3 *Pick. R.* 33.] In these cases, it is also well settled, that the damage to the plaintiffs is the *gist* of the action, and not the conspiracy. It seems also to be a rule, that in all cases, where fraud on the part of the defendant is averred, and damage to the plaintiff, in consequence of the fraud, an action will lie. This was so settled in the case of *Paisley v. Freeman*, (3 *D. E.* 51,) where the fraud was not intended to benefit the party committing it, and where there was no collusion between such party, and him who did, in fact, receive the benefit. The doctrine of *Paisley v. Freeman*, though sometimes questioned, has been fully sanctioned and established. [*Upton v. Vail*, 6 *J. R.* 181.]

Applying the foregoing principles to this case, it certainly is one of no difficult solution. The declaration, though somewhat informally drawn, sets forth a case of gross fraud practised upon the plaintiffs, whereby they were induced to sell their goods to *Lawrence* on credit. They have been injured, and the defendants, or some of them, benefitted by the fraud. It would be a reproach, indeed, to the law, if it did not afford redress for such a wrong.

The defendant, *Powers*, has assigned several special grounds of demurrer. I do not think that any of them are well taken. The averments of the declaration, specially objected to, are either by way of inducement, or are impertinent, or surplusage, or relating to matters which, from their nature, (if true,) lie peculiarly within the knowledge of the defendants. Impertinent matter may be stricken out of the pleadings, upon proper application to the court; and matters of inducement, or those which the plaintiff cannot be supposed to know with certainty, may be generally stated. [*Com. Dig. Pleader, C. 26, 27. 36. 31.*] They do not afford any ground for a special demurrer. The omission to lay a venue in the body of the declaration, cannot be taken advantage of, as reference may be had to that stated in the margin, (*Slate v. Post, 9 J. R. 81.*) and there appears to be a sufficient statement, as to time, in both counts of the declaration, which may be applied to any material averment. There must be judgment for the plaintiffs on the demurrer.

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*Judgment for the plaintiffs, with leave to the defendants, &c.*

[W. S. Johnson, *Att'y for the piffs.*]

[E. Anthon *Att'y for Davis.* W. P. Hawes *Att'y for Powers.*]

#### HUGH M'KEON versus JAMES CAHERTY.

An action of *debt*, for money had and received, in the form authorized by the second section of the "act to prevent excessive and deceitful gaming," [1. R. L. 153.] will lie against a *stakeholder*, to recover money deposited in his hands, upon the event of a trotting match: but the limitation of three months, prescribed by that act, affords a bar to the action; and if pleaded, will protect the *stakeholder*, as well as the winner.

THIS was an action of *debt*, for money *had and received*, according to the form authorized by the "act to prevent excessive and deceitful gaming." [1 R. L. 153. sec. 2.]

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The defendant pleaded, 1. *nil debet*; 2. the limitation of three months, prescribed by that act. To this last plea, the plaintiff replied, that the defendant was the *stakeholder* of a bet, made upon the event of a trotting match between two horses; and that the sum sued for, was deposited in his hands, as such stockholder, by the plaintiff. The defendant rejoined, that the trotting match was performed and decided, and that the plaintiff was a *loser* of the match. To this rejoinder, the plaintiff demurred generally.

*Mr. D. Graham* for the plaintiff, and in support of the demurrer, contended, that the rejoinder was no bar to the action, and being defective in substance, it was subject to a general demurrer. [He cited 10 J. R. 478. 7. Cowen's R. 496. 1. R. L. 153. sec. 2. Ib. 222. sec. 5. of the act to prevent horse-racing.]

*Mr. Anthon, contra*, for the defendant, insisted, that the limitation prescribed by the act giving the action, furnished a defence to the *stakeholder*, as well as the winner. [He cited 12. J. R. 1. 13. Ib. 88.]

**OAKLEY J.** When this case was formerly before us, [*ante. vol. 1. p. 300,*] we held that an action of *assumpsit*, would not lie against the defendant; and that if any action could be sustained, it must be debt, under the statute. The questions now presented in this record, are, first, whether an action of debt, in the present form, will lie; and, secondly, whether such action must be brought against a *stakeholder*, within three months after the cause of action accrues.

The first question seems to be decided in *Allen v. Ehle*, [7 Cow. R. 496.] That was an action of *debt*, in the form prescribed by the act, by the loser against the *stakeholder* of a bet, on the event of a horse-race. The objection was then taken, that the statute gave the action only against the *winner*. The court held, that the *stakeholder* was within its spirit and meaning, and the plaintiff was permitted to recover. That case, therefore, seems to be in point, upon the first question arising here.

As to the second question, the fifth section of the act to prevent horse-racing, [1 R. L. 222.] provides, that any person, who may have paid any money on the event of any race, may recover the same *in like manner*, as is provided in the second and third sections of the gaming act. The second section of that act, gives an action of debt, for money had and received, against the *winner*, provided the same is brought within three months after the cause of action accrued. As the action against the *stakeholder*, is founded on this act, in connexion with the fifth section of the act to prevent horse-racing ; it seems to me, that, the protection afforded to the winner, by the limitation in the act, is extended to him. No action can be sustained, under the second section of the gaming act, which is not commenced within three months after the loss of the money ; and as all actions under the fifth section of the act against horse-racing, must be brought *in the manner* prescribed by the gaming act ; it seems to follow, that the same limitation will apply to them.

I am of opinion, therefore, that upon the whole record, the defendant is entitled to judgment.

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*Judgment for the defendant, on the demurrer,  
with leave to the plaintiff, &c.*

[D. Graham, Jun, Atty for the plff. J. R. Whiting, Atty for the deft.]

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others.

BENJAMIN HARROD

versus

FRANCIS BARRETTO, JUN., AND CHARLES N. S. ROWLAND, im-  
pled with JAMES B. MURRAY AND SAMUEL WHEELER.

If, to an action of debt, on a judgment, obtained in another state, the defendant plead, that he "was never an inhabitant of, or resident in" the state, where the judgment was rendered, "nor within the jurisdiction of its courts;" that "the original process was never served upon him personally," and that he "never appeared to the suit, nor had notice of the same :" the plaintiff cannot set up, by way of estoppel, in his replication, that the "judgment record declares and avers," that the defendant did appear : but must take issue upon the fact of his appearance in the court, which rendered the judgment.

This cause was formerly before the court, upon a demurrer to the defendants' plea. [vol. 1. p. 155.] Judgment having been given against the defendants, upon that issue, for the want of an averment in their plea, that they had *never appeared* in the suit, in which this judgment was obtained : the defendants, Barretto and Rowland, now *amended* their original plea, by adding thereto the words, "*nor did they, or either of them, appear to the said process and suit.*" In every other respect, the plea remained in its original form.

To the plea *thus amended*, the plaintiff now replied, that the defendants ought not to be admitted, "to plead the plea, by them above pleaded, as to so much thereof, wherein they plead, that neither they, nor either of them appeared to the process," "in which the judgment," "set forth in the declaration" "in this suit, was rendered," because "the said judgment record declares and avers, that at the said Court of Common Pleas, begun and holden at Boston, in and for the county of Suffolk, on the first Tuesday of January, in the year 1827, the said defendants appeared to the said suit; and this the said plaintiff is ready to verify by the record. Wherefore, he prays judgment, if the said

"defendants" "ought to be admitted *against the said record*, to Aug. Term,  
 "aver, that neither they, nor either of them, appeared to the said  
 "process and suit, in the said Court of Common Pleas."

To this replication, the defendants interposed a general de-  
 murrer.

The cause was argued by *Mr. Hugh Maxwell* for the defendants,  
 and by *Mr. F. E. Betts*, and *Mr. Benedict* for the plaintiff.

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For the plaintiff it was contended, I. That the record of the judgment, both at common law, and by the constitution of the United States, is conclusive and undeniable evidence of the facts stated in it. [*Constitution of the U. S. art. 4. sec. 1. 2 Law U. S. 102. 8. Cowen's R. 314. 1. Peters' C. C. R. 74. 155. Mille v. Duryee, 7. Cranch. 481.*]

II. That the parties to the judgment, are estopped from denying the truth of its statements. [*7. Searg. and Raw. R. 171. 2. Mass. R. 462. 2. Mau. and Sel. 567. 1 Peters' U. S. Rep. 692. 328. 2. Ld. Raym. 1449.*]

III. That an estoppel *may* be set up in pleading, and if relied upon as an estoppel, it *must* be so set up. [*2 Barn. and Ald. 662. 668, 9. 12 Eng. Com. Law. R. 65. 1. Salk. 276. Arch. Plead. 218. 3. East. 346. 1. Chit. Pl. 459. (n. c.) 573, 4, 5. 1. Stark. Ev. 205. 17. Mass. R. 365.*]

*Mr. Maxwell, contra*, cited, *4. Con. Rep. 380. 1 Dallas R. 264. Kirby's R. 119. Smith v. Rice, 11. Mass. R. 511. Davol v. Davol. 13. Mass. R. 264. Bissett v. Briggs, 9. Ib. 463. Bartlet v. Knight, 1 lb. 402.*

OAKLEY J. When this case was formerly before us, we considered it the settled doctrine of the Supreme Court, that when an action is brought on a judgment obtained in another state, the defendant may plead any fact which goes to show, that the court, rendering the judgment, had not jurisdiction of his person. As the case now presents itself, the defendants have in their plea averred,

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that they were never residents or inhabitants of Massachusetts, and that they never appeared to the action commenced in that state. In answer to this plea, the plaintiff sets up, by way of *estoppel*, that it appears by the record of the judgment, that the defendants did appear in that suit: and the question now is, whether the averment of that fact, on the face of the record, is conclusive evidence of it.

If the principle of our Supreme Court is a sound one, (and we are bound to consider it so,) it must be followed out to its legitimate results. If a defendant has a right, in pleading, to deny the jurisdiction of the foreign court, it would be idle to permit that jurisdiction to be conclusively established against him, by the mere act of the officers of that court, in making up a record of the judgment. The court, in the very act of giving the judgment, avers jurisdiction of the defendant's person; and that averment is not the stronger, because it is specially entered in the proceedings of the court.

Though, in pleading, judgments obtained in our own courts, may be held to be conclusive as to their averments, yet the courts will take care, that they shall not be so in effect, when justice requires that they should be open to inquiry. Thus in *Denton v. Noyes*, [6. J. R. 296,] it was held, that where an attorney appeared for a defendant without authority, the court would consider it a good appearance upon the record. But they said, they would guard the defendant against the consequences of such an unauthorized appearance, by permitting him to come in and plead, if he had a defence, though the judgment was suffered to stand as a security for the plaintiff. The court thus adhered *formally* to the rule, that the averment of appearance, on the record, should be held to be true, but *practically* considered it of very little consequence.

If the averment, of the appearance of the defendants, in the present record, were held to be conclusive, a greater practical effect would, in truth, be given to the judgment, than if it were obtained in our own courts. The case of *Denton v. Noyes*, shows that the defendant, when an unauthorized appearance has been entered for him, may have effectual relief upon motion; and it is

presumed, that similar relief would be afforded in a like case, in Massachusetts. No such relief can be sought in the present case, in the courts of this state, and the defendant ought not to be compelled to go to Massachusetts, to apply to a court there, to set aside a judgment, which, if his allegation be true, that court had no right to render.

The simple course is to permit that to be done here, by plea, which would be done by motion, if this were a domestic judgment.

It was said at the bar, that the Supreme Court in *Wheeler v. Raymond*, [8. *Cow. R.* 311,] had virtually decided, that a defendant, in a case like the present, is concluded, by the averment of his appearance on the record. I do not so understand that case. The plaintiff there, in pleading a judgment in Vermont, averred the appearance of the party in the court of that state. That averment was not denied in the replication, and like every other fact, alleged in pleading and not denied, was of course admitted. The Chief Justice, it is true, observes, that "*by the record set forth in the plea, it appears, that the party did appear by his attorney, and he is, therefore, concluded by the judgment.*" But he is clearly to be understood as saying, that the party was concluded, not merely because the fact of appearance was stated on the record, but because it was averred in the plea. It was the common case of an averment by one party, and an admission of the truth of the averment by the other.

In *Aldrich v. Kenney*, [4 *Con. Rep.* 380,] the point now before us, was expressly decided by a court of great respectability. The action was debt on a judgment obtained in Rhode Island, and the plea was, in substance, similar to that in the present case. The plaintiff replied, that the defendant appeared to the action in Rhode Island, by his attorney, duly appointed, and pleaded therein. The rejoinder was, that the defendant did not appear and plead by his attorney duly and legally constituted. On the trial, the judgment record was produced, and that showing an appearance of the defendant by attorney, it was held conclusive; and the defendant was not permitted to prove, that the attorney of record was not authorized to appear for him. The court granted a new trial, on the ground that the proof offered by the defendant

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ought to have been admitted. Chief Justice Hosmer, in a very elaborate opinion, recognizes the doctrine of our Supreme Court, as to the effect of a judgment obtained in another state: and he held, that the averment of the appearance of the defendant, contained in the record, was not conclusive. He remarks, (what is well known to be generally true,) that "the attention of the court "is seldom, if ever called to the inquiry, whether a person, claiming to be the attorney of a party is really such; and the record, "by the management of the plaintiff, need never be destitute of "this affirmation."

I am of opinion, that the plaintiff, in the case before us, should have taken issue on the fact of the appearance of the defendants, in the court of Massachusetts. The averment in the record may avail him on the trial, as *prima facie* proof of the fact; but it cannot be set up as an estoppel, either in pleading, or in evidence.

*Judgment for the defendants on the demurrer,  
with leave for the plaintiff to withdraw his  
replication, and take issue on the plea.*

[Betts and Benedict, Atty's. for the plff. W. P. Hawes, Atty. for the deft.]

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**ELIZABETH ROBERTS versus JOHN C. KELLY.**

The plaintiff declared on a promissory note, bearing date the 20th of June, 1816, and also for goods sold, money paid, &c. The defendant pleaded a discharge under the 9th section of the act "giving relief in cases of insolvency," passed April 12th, 1813. The plaintiff replied, admitting the discharge, but averring that the consideration of the note arose *out of the state of New-York*, before the passing of the act, and that the plaintiff then resided out of the state, to wit, at Philadelphia. The same matters were also set forth relative to the goods, money, &c., specified in the second count of the declaration. The defendant rejoined, stating that "at the time when," &c., he was an *infant*, residing in the state of New-York, and so continued until after the passing of the act; and that he resided in said state until after he arrived at the age of 21 years.

Upon demurrer to the rejoinder, it was held to be a *departure* from the plea, and, consequently, bad. That the replication was bad, also, for duplicity; but as that defect could not be noticed, except upon a special demurrer, the plaintiff had judgment on the issue.

THE declaration in this case, contained a count upon a promissory note for 160 dollars and 75 cents, dated "New-York, June 20th, 1816," by which the defendant promised to pay that sum to the plaintiff, or the person she might appoint to receive the same, "for value received by him, October 29th, 1812, with interest from that time." To this there were added, counts for goods sold and delivered, work and labor, money lent and advanced, had and received, &c.

The defendant pleaded, first, the general issue. 2. The statute of limitations. 3. A discharge, on the 10th day of December, 1816, under the 9th section of the act, "giving relief in cases of insolvency," passed the 12th of April, 1813.

The plaintiff, upon the second plea, tendered an issue to the country, and to the third plea replied, admitting the discharge, but averring that the promissory note was made and delivered to her in consideration of the sum of \$160.75, paid, laid out, and expended by the plaintiff for the defendant, "*out of the territory, limits, and jurisdiction of the state of New-York, and before the passing of the said act,*" to wit, "on the 29th day of October, 1812, at Philadelphia," in the state of Pennsylvania, the plaintiff, at that time,

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"actually residing" there. The same matters were also alleged relative to the goods, money, work, labor, &c. mentioned in the second count, and the plaintiff prayed judgment, &c. "to be levied, not on the person of the defendant, but on his lands, goods, "and chattels, &c." With regard to the third plea, so far as it related to the promises and undertakings mentioned in the last count of the declaration, (which was upon an *instimul computas-* tent,) the replication concluded by stating, that the plaintiff would not, as to them, "further prosecute her suit against the defendant."

The defendant joined issue upon the replication to the second plea, and to the replication to the third, he rejoined, averring that, at the time when the consideration for the said promissory note was advanced, and when the goods, money, &c. mentioned in the second count were furnished, to wit, on the 29th day of October, 1812, *he was an infant*, of the age of 17 years, and so continued to be, until after the passing of the said act, "giving relief in cases of "insolvency," "the said defendant before, and at the time of, "and after he obtained the age of 21 years, hitherto actually residing within the territory, limits, and jurisdiction of the state of "New-York, to wit, at the city of New-York aforesaid :" concluding with a verification.

To this rejoinder the plaintiffs demurred, and for cause set forth, first, that the rejoinder was a *departure* from the third plea in this: that said *plea* sets up, as a defence to the action, a *discharge* after the making of the promises; whereas, the *rejoinder* sets forth that the defendant was an infant at the time of making the promises. 2. That the rejoinder was a departure in this also; that it set up matters in answer to the replication, which might have been pleaded as a defence to the *declaration*. 3. That the rejoinder was double and confused, in stating that the defendant was an infant on the 29th day of October, 1812, and so continued to be until after the passing of the act, &c. 4. That the rejoinder was argumentative, by seeking to raise an inference, that the defendant could not, after he became of age, ratify the acts done by him while an infant, &c.

The defendant having joined in the demurrer, the cause was argued by *Mr. E. Paine* for the plaintiff, and by *Mr. R. S. Church* for the defendant.

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*Mr. Paine* contended, I. That the rejoinder, if bad in part, was bad for the whole. [1 *Chit. P.* 643.] It sets up infancy either as a distinct substantive bar, or it sets it up to aid and support the plea of discharge. In either way it is a departure,—in the first, clearly so,—in the second, because there is no material and obvious connexion between the two defences, and because the attempt made to show a connexion, has failed entirely; or, in other words, as the defences stand upon the record, that of infancy does not support that of the discharge.

II. The rejoinder is double and confused, in stating facts which have no obvious and natural relation, in such a way, that no relation between them is apparent upon the face of the pleading; that is, the facts, as they stand upon record, do not appear relevant to any one purpose.

III. The rejoinder is argumentative. Every pleading is a statement of facts, as premises, from which the law is to draw a conclusion. But the premises themselves must be stated. It is not sufficient to state facts from which the premises may be drawn by the court by way of inference. If facts are stated, from which the conclusion of law cannot be drawn, without interposing a fact by way of inference, the consequence is, that the pleader, who is to reply, may mistake as to the fact to be inferred, and he is obliged to take issue upon several facts from which the inference is to be drawn. The only material facts sought by this rejoinder, to be put in issue, are, that when the defendant made the original promise, he was an infant, and that he never ratified it, except in this state, under and with reference to the insolvent law. The last fact is a matter of inference, and by no means a clear one. [See the observations of SPENCER J. in *Tracy v. Dakin*, 7 *John. Rep.* 79.]

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IV. The rejoinder is bad in substance.

1st. The promises alleged, if made by the defendant when an infant, are voidable only, and it is incumbent on him to show a disaffirmance,—not on the plaintiff to show a ratification. [2 *Kent's Com.* 194, and cases there cited.]

2d. These facts are to be considered subject to the chain of pleading under which they arise. By first pleading his discharge, the defendant admits that the promises alleged in the declaration were neither void nor voidable, but binding upon him. By pleading his discharge in this state, the defendant made it necessary for the plaintiff to new assign his promises, and place upon record the time and place where they were actually made. But as these promises were sufficiently specified in the declaration, to charge the defendant with a knowledge of the actual promises, he cannot say that, until replication, he did not know that the promises there newly assigned were the promises alleged in the declaration. He, therefore, by his plea, admits the promises to be good, and cannot gainsay this admission in his rejoinder. If the defendant had wished to use his infancy as a bar, he should have pleaded it, and then if the plaintiff had replied a ratification, the defendant might have rejoined a discharge, (if he can plead it at all in such a case,) from the ratification. In that way the question would have been properly presented to the court, and in due order.

The rejoinder, so far as the common counts are concerned, is just as good to the declaration as to the replication, and if the replication were withdrawn, would apply exactly in its terms to the allegations of the declaration. This shows that it was not the replication alone which called for it.

3d. The rejoinder admits the contract, to have been made, out of the state, &c., but seeks to subject it to the operation of the insolvent law, by saying that the defendant was an infant when he made it, and that he ratified it subject to the law, &c. Now if this were all true, and if a ratification were necessary, and the original contract was not subject to the operation of the law, the ratification would not make it so. The ratification is not the contract. It is the contract which is sued upon, and not the ratification.

The contract has a consideration, terms, two parties, both consenting, and both to be bound. The ratification is the mere subsequent assent of one party, and nothing more. The other may not be present, nor know any thing of it. If a judgment is recovered on a note given here for a contract made out of the state, our courts pass by the note or judgment, and look at the contract, and that only, to see whether it is subject to our insolvent law. If, then, where the promisee chooses to take a judgment or note, within this state for his old demand, it is held not to subject it to the insolvent law, much less ought a mere ratification to have that effect, which is, perhaps, merely *ex parte* and unknown to the promisee. Whether the defendant was an infant, or of age, when he made the original promise, is not material. In either case, if he gives a new note for it, in this state, the intention is the same, viz. to put a note in the place of the original contract, and nothing more.

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4th. The rejoinder is supposed not to set up infancy as a new and substantive defence, but to introduce the infancy in support of the discharge. It seeks to show that the contract required ratification, and that the ratification comes within the insolvent law. Now all that the rejoinder states to show that the contract required ratification is, that it was made by the defendant while an infant. But this does not show that a ratification was necessary. All contracts, made by infants, do not require ratification—for necessaries, for example. Here, then, is a fatal omission. It is no answer to say, that the defendant having rejoined his infancy, it is incumbent on the plaintiff to show that the contract was for necessaries.

5th. The language of the rejoinder is such, that it does not succeed in excluding, as it intends to do, the possibility of a ratification after the defendant was of age, out of the state. It does not aver that the defendant *always* resided in this state after he was twenty-one,—*non constat*, that he did not ratify the contract out of the state, after he was of age.

V. The rejoinder is also bad in substance, because it was incumbent on the defendant to allege, that by the laws of Pennsylvania, infancy affected the contract. In *Thompson v. Ketcham*, [8

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*John R. 193-4,*] the court say, "if the defendant had specially pleaded infancy, he ought to have accompanied it with an averment, that, by the law of Jamaica, he was an infant, and the contract not binding upon him."

VI. The rejoinder being bad as to the common counts, (if not as to the count upon the note,) is bad for the whole.

*Mr. Church*, for the defendant, *contra*, contended, I. That if the pleading demurred to was defective, still that the plaintiff was guilty of the first fault in pleading.

The plaintiff, by the replication, admits the discharge as pleaded by the defendant. After this admission, she cannot be permitted to say it is only operative with half its force; that is, only as to the defendant's body.

The discharge is pleaded as a whole, and not by halves, and must be treated either as good or bad; having admitted it to be good by her replication, the plaintiff cannot deny its force and effect.

The plaintiff having declared expressly upon a note, stating the consideration to have arisen in Pennsylvania, prior to the passage of the insolvent act of 1813, and the defendant having pleaded his discharge thereto, if the plaintiff wished to contest the effect, force, and validity of that discharge, she ought to have put it in issue.

The replication does not present such an answer to the plea of discharge, as that a proper issue can be taken on it; or at all events, an issue more proper than the one tendered by the defendant, by his rejoinder.

The insolvent act of 1813, was never intended to discharge any but legal liabilities, and it will be seen from the pleadings down to the demurrer, that there never was any legal liability of the defendant to the plaintiff, until after the passage of that act, in reference to which, that liability must be construed to have been incurred by the defendant; for, by the demurrer, the facts in the pleading are admitted to be true.

If the replication is bad in part, it is bad for the whole.

Does the replication, as to the plea of the discharge, amount to any thing more than a repetition of the declaration, so far as it goes beyond the admission of the discharge? It merely alleges the original consideration to have arisen in the state of Pennsylvania, which is also alleged in the declaration, and put in issue, by the defendant's plea. The plaintiff, in order to defeat the plea of discharge, which she admits, repeats the allegation of a foreign consideration, alleged in her declaration, and would ask the court to *infer* and apply the law for her. The defendant meets the allegation, and pleads facts, that show the discharge to be valid, even allowing the plaintiff's allegation to be true, and asks the court to interfere in behalf of the truths of the case, and apply the law to the fact. If it was competent for the plaintiff to reply a foreign consideration, it was equally competent for the defendant to rejoin facts, to show that that consideration did not raise a legal liability on him, excepting under the laws of this state.

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Whether by the laws of Pennsylvania, the contract would be binding upon an infant or not, as in this case, it was not material for the defendant to aver, as the action was personal and transitory, and being an infant, and an inhabitant of this state, before and after his legal liability arose, he is entitled to the protection of our laws.

*Mr. Paine*, in reply.

I. The defendant's counsel is mistaken as to a fact, which he repeats several times in his argument, viz., that the consideration of the note declared on, is described in the declaration as having arisen in *Pennsylvania*. It does not appear, either from the note or declaration, where the consideration arose.

II. The rule that the court will give judgment against the first defective pleading, applies only to defects in substance. Now all the defects to which the defendant's counsel objects in the plaintiff's replication, if they could be considered as defects, are defects of form.

It is unnecessary to cite those cases, in which the Supreme Court of the United States held insolvent discharges to be void, so

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far *only*, as they attempt to discharge the property. In *Mather v. Bush*, [16 Johns. 233,] the Supreme Court of New-York established the law, that such discharges are valid, when applied to contracts made by the parties, with reference to the insolvent law. It, therefore, became necessary for the plaintiff to aver facts, which show that the contract was not made with reference to the law, viz.: that the contract was made out of the state, or before the passage of the law, or both. If the declaration does not contain such an averment, (as it need not, and, as in this case, it does not,) then it must be averred in the replication. Such were the pleadings sanctioned by the court, in *Wyman v. Mitchell*, 1 *Coven's R.* 316, and *Raymond v. Merchant*, 3 *Ib.* 147.

THE COURT gave judgment for the plaintiff on the demurrer, upon the ground that the rejoinder was a departure from the plea. They held also, that the replication was defective for duplicity, but that this defect, being one of form merely, could not be noticed except upon a special demurrer,—as the rule, that the court will give judgment against the first defect in pleading, applies to defects in substance only.

{E. Paine, Atty for the plff. R. S. Church, Atty for the deft.}

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SAMUEL CANDLER versus RICHARD PETIT.

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In an action for a malicious prosecution, it appeared that the defendant presented himself, with several witnesses, before the Grand Jury, which indicted the plaintiff, and gave oral testimony, charging him with having committed the crime of perjury. The District Attorney, by direction either of the defendant, or his counsel, (it did not clearly appear which,) laid a certain affidavit, made by one W., (who was dead,) before the Grand Jury, who returned it to him, with directions, that an indictment should be drawn against the plaintiff. The District Attorney thereupon drew an indictment, founded upon the affidavit of W. exclusively; and upon that indictment, the plaintiff was eventually tried and acquitted.

Between the time of the finding of the bill and the trial of the cause, the defendant caused the trial to be put off, upon an affidavit of his own, stating the absence of a material witness; and when the trial came on, his counsel discovered, for the first time, that the perjury alleged in the indictment, differed from that charged by the oral proof, laid before the Grand Jury, and that the indictment could not be supported. They therefore abandoned the prosecution, and the plaintiff was acquitted.

Upon the trial of the action for a malicious prosecution, the Judge charged the jury, that if the defendant had no probable cause for his accusation, he could not be excused from the consequences of *prosecuting* the indictment, even if he were under a misapprehension as to the specific charge contained in it, or ignorant of its contents.

HELD, that this direction was incorrect, although the defendant would be liable for *prosecuting* the indictment, if aware of its contents, even if it did assign a perjury differing from that charged by himself.

HELD ALSO, that the defendant would be liable, if the affidavit of W. was sent before the Grand Jury by him, or by his direction: but that he might defend himself by showing that there was probable cause for the charge actually made by him before the Grand Jury; although that defence would not be a complete one, unless it showed a probable cause for the *whole* charge.

THIS was an action on the case for a malicious prosecution.

The declaration contained two counts. The first count set forth, in substance, that the defendant, at a Court of General Sessions of the Peace, holden in and for the city and county of New-York, on the first Monday of June, in the year 1828, falsely and maliciously, and without probable cause, indicted the plaintiff, and caused and procured him to be indicted for perjury, in the testimony given by him upon his examination as a witness on the

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trial of an indictment against one *William Williamson* for perjury, in the Court of General Sessions of the Peace for the city and county of New-York, in October, 1827; and that the defendant falsely, maliciously and without probable cause, caused and procured the said indictment to be prosecuted against the plaintiff, until the plaintiff afterwards, at the General Sessions of the Peace, held in and for the city and county of New-York, on the tenth of October, 1828, was by due course of law acquitted of the charge by a jury, and discharged therefrom by the court, and the prosecution was wholly ended and determined.

In the indictment, which the plaintiff, in *this* count of his declaration, assigned as the false and malicious prosecution complained of, the Grand Jury described and stated the perjury for which they indicted him, to consist in this; that upon the trial of Williamson, as mentioned in the declaration, it became material to inquire, whether Williamson, in 1823, had met Candler, the plaintiff, on the Royal Exchange in London, and whether he, Williamson, had then had a conversation with Candler, respecting Petit, the defendant, in this suit, and whether Candler had admitted, in that conversation with Williamson, that Petit, was indebted to him, Candler, in only the sum of twenty three pounds sterling, or thereabouts. That Candler, on being interrogated upon the said trial, to those points, did falsely swear, and give in evidence in substance, that Williamson had *not* met him, Candler, on the Royal Exchange in London, in the year 1823, and that Williamson had not had any conversation with him, Candler, respecting Petit, the defendant, and that he, Candler, had *not* admitted in any conversation with Williamson, that Petit was indebted to him, Candler, in the sum of twenty three pounds sterling, or in any other sum whatever: whereas in truth and in fact, Williamson did meet him, (Candler,) in 1823, on the Royal Exchange in London, and had a conversation with him respecting Petit,—and Candler did admit in a conversation with Williamson, that Petit was indebted to him, Candler, in the sum of twenty three pounds sterling.

The second count stated, in substance, that another bill of indictment, which the defendant *Petit*, well knew was found and presented

*without any reasonable or probable cause*, had been found and presented against Candler, the plaintiff, for a charge of perjury, in all respects similar to the charges mentioned and described in the first count: and that the defendant, Petit, afterwards, falsely, maliciously, unlawfully, and without probable cause, *caused and procured the same to be prosecuted*, until the plaintiff was at a General Sessions of the Peace, held in and for the city and county of New-York, on the tenth of October, 1828, by due course of law, acquitted of the charge by a jury, and discharged therefrom by the court, and the prosecution was wholly ended and determined.

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A third count was also added, stating in general terms, that the defendant, Petit, at the time therein specified, falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff, Candler, with having committed *felony*, by means of which charge, the plaintiff was indicted; and the defendant, falsely, maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said indictment to be prosecuted for a long space of time, to wit, the space of four months then next following, at the expiration of which time, the plaintiff was duly discharged, and by a jury in due form of law acquitted.

To this declaration the defendant, pleaded the general issue.

The cause was tried before Mr. Justice OAKLEY, on the 9th day of April, 1829. At the trial, the plaintiff, in order to maintain the issue on his part, produced, and read in evidence an exemplification of the record of indictment against him, and of his acquittal; from which it appeared, that the charges against the plaintiff were such as the two first counts of the declaration stated and described them to be, and that he was acquitted of them by the jury.

The plaintiff then called John D. Brown, one of the Grand Jury, which found the indictment against Candler, as a witness. He testified, that Petit appeared before that Grand Jury as a witness against Candler, and swore that the plaintiff had arrested him in a civil action for 10,000 dollars, and had obtained a judgment against him for upwards of 5000 dollars; when the true balance due from himself to the plaintiff, was only £23. 10s. 4d.; and that he (Petit) had a witness to prove that Candler had admitted

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the above balance to be the true one. That Candler had sworn that he did not know Williamson, who had testified in said civil suit, and had never seen him before that trial; whereas he (Petit) knew that Williamson was intimate with Candler, and had often seen them together in company. That Candler had admitted to one Captain Augustus H. Griswold, in London, that he claimed only £20 of Petit.

Mr. Brown also testified, that three other witnesses were examined before the Grand Jury, viz: A. H. Griswold, Orlando Harriman and John Griswold; and their testimony (which was detailed) tended to support the evidence of Petit. That the Grand Jury intended to indict Candler, for swearing that Petit owed him a large sum, instead of a small one, and that he did not know Williamson. That the Grand Jury were chiefly influenced by the oral testimony before them, but they also took into consideration a certain affidavit made by Williamson, which was laid before them by the District Attorney. *It was this affidavit which first induced the Grand Jury to enter upon the investigation of the complaint against Candler.*

The affidavit referred to, by the witness, was then read by the counsel for plaintiff. It was subscribed by Williamson, and bore date the 9th of October, 1827. It stated, that on trial of the indictment against Williamson for perjury, on the 3d day of October, 1827, Candler being examined as a witness, swore, that he never saw the defendant in the city of London, and never admitted to him, that Petit was indebted to him, (Candler,) in the sum of £23, only, nor any thing to that effect; and that the statement so made by Candler under oath, *was in all respects false.*

The plaintiff then called Hugh Maxwell, Esq., as a witness, who testified, that he was the District Attorney for the city and county of New-York, at the time the trials before referred to were had. That an indictment was preferred against Williamson for perjury, founded upon the oath of Candler. That upon Williamson's trial, Candler was examined as a witness, but the defendant was acquitted. That subsequently, Williamson preferred a complaint against Candler for the same crime, founded upon the affidavit before referred to; which complaint was submitted to the Grand Jury

and dismissed. After this, Williamson died, *and after his death, Petit came to the witness and said he wished to go before the Grand Jury, in reference to the charge of Williamson.* That Petit and one Richard Cliburn came to the office of the witness together, and made the same request. That William M. Price, Esq., appeared as counsel for Petit, and either in the presence of Petit, or afterwards, requested that the *papers* might be laid before the Grand Jury; but the witness knew of no papers, besides Williamson's affidavit. That the witness, thereupon, *sent that affidavit to the Grand Jury*, who returned it to him, with directions for the District Attorney to draw a bill against Candler; and upon that affidavit, and that alone, he drew the indictment referred to in the declaration. Afterwards, at the July term of the Court of Sessions, in the year 1828, Mr. Price and Mr. J. Duer, appeared as counsel against Candler, and *moved to put off the trial of the cause* upon an affidavit made by *the defendant*, wherein he stated, that Captain A. H. Griswold, of the London packet ship Cambria, was an important witness for the prosecution, and would swear that Candler had admitted to him, that Petit owed him but £20; that Williamson was known to Candler, and that the general character of the latter was bad. That Griswold was then absent in said ship, and would not return before the following September. Upon this affidavit, the trial was postponed until the return of Griswold.

Afterwards, at the October term of said court, the counsel against Candler appeared and declared, that they were unwilling to proceed to the trial of said cause, on the ground, that the indictment alleged a perjury to have been committed by Candler, *different from that* which they had *intended* to submit to the Grand Jury; and that the testimony they were prepared to offer, would not support the indictment found. Mr. Maxwell further testified, *that he should not have taken any measures against Candler, but for the earnest solicitations of Petit and Cliburn.*

Upon his cross-examination he also testified, that he was present in court, when the *civil* suit of Candler against Petit was tried. That Williamson, on that occasion, stated that the conversation between himself and Candler, was held when they were *alone*. That Candler, after that trial, swore, in open court, that he had

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never, to his knowledge, seen Williamson before ; that he had never conversed with him, and that the true balance due to him from Petit, was upwards of 5000 dollars. *That when Candler was tried, Williamson was dead*, and the counsel employed by Petit, declared, in open court, that *they* were ready to try the indictment, if it were amended so as to meet the facts of the case. This offer was declined by Candler's counsel ; and the witness himself, thought it ought not to have been accepted.

Upon this testimony, the counsel for the plaintiff rested their cause ; and thereupon, the counsel for the defendant moved for a non-suit, upon the ground, first, that the affidavit of Williamson was the foundation of the indictment, and that, therefore, the defendant could not be charged as the author, or instigator of the prosecution, he not having sworn to any fact, in corroboration of Williamson's testimony.

II. If the Grand Jury found the indictment upon the oral testimony before them, then the bill, having assigned a perjury differing from that testimony, the defendant was not chargeable with the mistakes of the Grand Jury, nor those of the District Attorney.

III. The affidavit of Petit, upon which the trial of the indictment against Candler was postponed, could not implicate him as a party prosecuting the indictment. 1. Because he was ignorant, at the time he made the affidavit, that the indictment did not embrace the complaint preferred by *him* before the Grand Jury. 2. Because the defendant and his counsel were ignorant, *at that time*, as to the specific charge contained in the indictment. 3. Because a prosecuting party is not bound in law, to be held responsible for the mistakes or errors of the Grand Jury, in directing the form or mode, in which an indictment is to be drawn, nor for those of the District Attorney, who draws the indictment.

Upon these points, the presiding judge expressed an opinion, that the plaintiff could not, as the proof then stood, recover upon the *first* count of his declaration, as there was not enough to show,

that the defendant had indicted the plaintiff, or *caused* him to be indicted. As to the second count, wherein the defendant was charged with having falsely and maliciously caused the indictment against the plaintiff *to be prosecuted*, the presiding Judge was inclined to the opinion, and for the purposes of the trial, ruled, that the plaintiff had adduced evidence enough in support of that count, to warrant him in going to the jury. The motion for a non-suit, was therefore denied, and an exception to the opinion of the Judge taken by the defendant.

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The counsel for both parties, then went into a full and elaborate investigation of the merits of the cause, each party producing many witnesses, and much documentary testimony, to support their various allegations. But as the testimony was very voluminous, and is not necessary to a correct understanding of the points decided, all details relating to it are omitted.

On the part of the defendant, it was alleged, that in point of fact, Petit owed Candler but £23. 10s. 4d.; that Candler was well acquainted with Williamson, in London, and that Petit had the strongest possible cause to believe, that Candler had committed the perjury wherewith he was charged. To support these allegations, all the accounts between the parties were produced, and several witnesses examined.

On the part of the plaintiff it was contended, I. That the true balance, due from Petit to Candler, was indicated by the judgment obtained by the latter against the former. That Williamson was *suborned* by Petit to testify, on the trial of the civil cause, to a pretended conversation between himself and Candler, which never took place. That he testified falsely on that occasion, and the jury being charged by the Judge, who tried that cause, (William Duer, Esq.,) to find a verdict for the defendant, (Petit,) if they could credit the testimony of Williamson, found a verdict for the plaintiff, for the full amount of his claim, (5000 dollars and upwards,) in the teeth of Williamson's testimony. That the Judge, being strongly impressed with the belief, that Williamson was a corrupt witness, caused Candler to make the affidavit, upon

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which the indictment against Williamson was founded. That afterwards, on the trial of Williamson, Petit suborned Cliburn to appear as a witness to contradict Candler, and sustain Williamson. That after Williamson's acquittal and death, Petit made two several attempts, before different Grand Juries, to cause Candler to be indicted, but that his complaints in both instances were unanimously dismissed. That he persevered in his efforts, employed eminent counsel, and finally succeeded in causing Candler to be indicted and tried. That Petit not only had no probable cause for *believing* Candler to be guilty of perjury, but *knew him to be entirely innocent of that charge*.

The evidence chiefly relied upon, to prove that Cliburn and Williamson were suborned by Petit, consisted of the *cross-examinations* of those witnesses, and the *letters* of Petit himself. From these it appeared, that Petit and the two witnesses were all Englishmen, Cliburn residing in London, the others in America. That after Williamson's indictment, Petit employed one Charles Shepherd, (an Englishman also,) to go to London and collect testimony to sustain Williamson, and "not be *particular about the means of procuring it.*" That, while there, Petit addressed a great number of letters to Shepherd, upon the subject of his mission. That Shepherd employed Cliburn to come to America, as a witness; but before he could complete his business, was himself compelled to abscond, leaving his papers behind him. That these papers, together with the *letters of Petit*, (which were all in a trunk together,) were sent out to Edward Hardie, Esq., of New-York, by the creditors of Shepherd. That Mr. Hardie, upon inspecting the papers, discovered that the letters deeply implicated Mr. Candler, and, without knowing the merits of the case, and being a stranger to Candler, caused the letters to be conveyed to him, after they had been submitted to Anthony Dey, Esq., the counsel of Mr. Hardie.

The testimony upon both sides was very complicated and extensive, and the defendant insisted most strenuously, that whether Candler was guilty of perjury or not, the defendant had the strongest possible reasons, for *believing* that he was perjured, and that his evidence established that part of his defence, conclusively, as

well as the fact, that Candler swore falsely, when he declared, that he did not know Williamson, and that Petit owed him upwards of 5000 dollars.

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The defendant contended, also, that he had been in no way instrumental in procuring, or prosecuting the indictment, on which Williamson was tried, and to sustain that part of his defence, he called William M. Price, Esq., as a witness.

Mr. Price testified, that he was counsel for Williamson on his trial for perjury. That Candler was sworn as a witness, and testified, that he had never seen Williamson, until he appeared as a witness on the trial of the civil suit. That he had never stated to any one that Petit owed him only £23, or thereabouts, and that the fact was otherwise. Mr. Price also testified, that he acted as counsel for Williamson, when he preferred his complaint against Candler, for perjury. That he, (Mr. Price,) drew up an affidavit for Williamson, which was sworn to by him, and submitted to a Grand Jury, who dismissed the complaint. That after the death of Williamson, the witness acted as counsel for the defendant, who wished to prefer a complaint against the plaintiff for perjury. That he spoke to Mr. Maxwell on the subject, and told him that the defendant, (Petit,) wished for an opportunity of going before the Grand Jury; but the witness never did, at any time, request the District Attorney to lay the affidavit of Williamson before them. That he never saw the indictment against Candler, until the day before his trial, and when he drew the affidavit of Petit, upon which the motion for putting off the cause was founded, he had not seen the indictment, and was ignorant of its contents, but supposed it had been drawn by the District Attorney, in conformity with the oral testimony laid before the Grand Jury. On the evening before the trial, Mr. Duer and the witness, for the first time, examined the indictment, and immediately determined that it could not be supported by the evidence they were prepared to offer. They communicated their views to Mr. Maxwell, who, nevertheless, persisted in bringing on the trial. When the cause was called, the witness and Mr. Duer declined to appear as counsel for the prosecution, but offered to try the cause without delay, provided the indictment was so altered, as to conform to the oral

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testimony laid before the Grand Jury. This offer being declined, the counsel for Petit abandoned the prosecution.

The counsel for the defendant, also called Mr. Geraud as a witness, who was on the same Grand Jury with Mr. Brown. He testified, that the indictment of Candler, was procured by the oral testimony presented to the Grand Jury, although he did not doubt that the affidavit of Williamson had some weight with them.

Mr. Maxwell, being recalled by the plaintiff, testified, that his impression was, that Mr. Price had requested him to send the papers before the Grand Jury; but, if the request was not made by him, he was confident it was made by Petit himself.

The cause having been summed up upon the evidence, the Judge charged the jury; and after explaining the nature of the plaintiff's cause of action, he instructed them, that if either of the counts of the declaration were supported by proof, the plaintiff was entitled to a verdict. That the question first to be decided, was, whether the defendant had indicted the plaintiff, and caused and procured him to be indicted for the crime of perjury, as set forth in the first count of the declaration. That the charge made by the defendant before the Grand Jury, was essentially different from that stated in the indictment. That the indictment appeared to have been founded upon Williamson's affidavit; but if Petit himself requested the District Attorney to lay that affidavit before the Grand Jury, he was responsible for the consequences.

That if the jury, upon weighing the testimony of Mr. Maxwell and Mr. Price, should be of opinion, that the affidavit was *not* sent to the Grand Jury by the defendant's procurement, then the second inquiry was, whether the defendant caused the indictment to be prosecuted, *not having probable cause to believe, that the charge therein contained was true*. If the defendant had not such probable cause, then there was sufficient evidence to show, that he was influenced by malicious motives, and that malice might be implied from the want of probable cause. With respect to the second inquiry, the Judge told the jury, that he was inclined to the opinion, and so he would charge them for the purposes of the trial, that if the defendant was under a misapprehension, as to the specific charge contained in the indictment, or was wholly ignorant of its

contents, he was not, in judgment of law, to be excused from the consequences of prosecuting that indictment. The main question to be decided by the jury was, whether the defendant had *probable cause* for preferring, or prosecuting his complaint.

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It was incumbent on the *plaintiff* to prove, that in preferring that complaint, the defendant acted *without probable cause*, and from malicious motives. In determining the question of probable cause, the jury were to consider the state of the accounts between the parties, and decide upon the questions of fact in relation to them, which were presented by the evidence. That as to the question, whether Candler actually knew Williamson or not, that was only important, from the influence which it might have upon the main controversy as to the accounts. If Candler was acquainted with Williamson, and yet denied all knowledge of him, such denial might well cast suspicion upon his assertions and claims in other particulars.

With this exposition of the law, the Judge submitted the cause, remarking, that if the jury should find a verdict for the plaintiff, they would be justified in awarding exemplary damages in his favor. He also instructed them, that if their verdict was for the plaintiff, it would be proper for them to state, whether it was founded on the two first counts of the declaration, or on one, and which of them.

Under this charge, the jury returned a verdict for *twelve thousand five hundred dollars*, in favor of the plaintiffs.

*Mr. G. Brinckerhoff and Mr. J. Duer*, for the defendant, now moved for a new trial, and contended, I. That there was not any evidence, produced on the trial, to support the first count of the declaration; on the contrary, that the evidence produced, clearly showed that the defendant was not instrumental in procuring the indictment.

II. That the evidence produced, did not support the second count; and that the action for a malicious prosecution, being in the nature of a criminal prosecution, could only be supported by

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proof of express malice on the part of the defendant, and a total want of probable cause for the prosecution, on his part.

III. That the affidavit made by the defendant, to put off the trial, was made in ignorance of the form of the indictment, and could not, therefore, afford any evidence of malice, or want of probable cause.

IV. That the verdict of the jury being upon the two first counts of the declaration, it could not be sustained, unless the evidence would support both counts.

V. That the verdict was against the evidence ; the damages were excessive, and the Judge misdirected the jury in his charge, especially in relation to the second count.

*J. P. Hall and Mr. Robert Sedgwick, contra,* for the plaintiff, contended, I. That the jury were authorized, by the evidence, to find a verdict for the plaintiff on the first count, on the ground that the defendant procured the affidavit of Williamson to be sent to the Grand Jury.

II. If the defendant had nothing to do with the sending of Williamson's affidavit before the Grand Jury, still the verdict was right ; 1. because it was proved, that no bill would have been found without the testimony of Petit and his witnesses. 2. Because the testimony of Petit and his witnesses did, in fact, tend to prove the allegations of the indictment, and might have been produced on the trial, to establish the same, and, therefore, it must be intended, that this testimony helped to procure the indictment. 3. Because the testimony aforesaid, went to confirm the general credit of the affidavit of Williamson, and to cause the jury to believe it to be true. [Jones v. Gwynn. Gilbert's Cases, 185. 4 Term. R. 247. 2 Stra. R. 691. Bul. N. P. 13, 2 Esp. N. Pri. 117, 118.]

III. The charge of the Judge was correct in all its parts ; the damages were not excessive, nor was the verdict contrary to the evidence.

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JONES, C. J. Delivered the opinion of the court, and, after stating the pleadings, proceeded as follows :

At the trial of this cause, the counsel for the plaintiff in the first place, produced an exemplification of the record of his indictment and acquittal, by which it appears, that the charges against him, were such as the two first counts of the declaration describe them to have been, and that he was acquitted of them by the jury.

Testimony was then offered by the plaintiff's counsel, to show that Petit was the prosecutor, by whose agency and procurement the bill of indictment was found, and who actively pursued the prosecution against him. It appeared in evidence, that an indictment had been preferred against Williamson, on the complaint of Candler, for perjury alleged to have been committed by Williamson, in his testimony on the trial of a civil suit, brought by Candler against Petit for the recovery of a debt.

That the indictment against Williamson was brought to trial ; that Candler was examined as a witness in support of the accusation, and that Williamson was acquitted ; that Williamson, after his acquittal, preferred a complaint against Candler, charging him with perjury in his testimony on the trial of the indictment against him, Williamson, and on that occasion made an affidavit of the matters in which he charged Candler to have been guilty of the perjury.

The complaint of Williamson was submitted to a Grand Jury, and dismissed.

Williamson afterwards died ; and Petit, after his death, preferred a complaint against Candler for perjury on the same trial ; and, in his testimony before the Grand Jury on that occasion, he stated, in substance, that Candler had obtained a judgment against him, Petit, for five thousand dollars, when the true balance due from him to Candler, was about twenty-three pounds ten shillings and fourpence sterling, and no more ; that on the trial of the civil suit between Candler and himself, Williamson had proved the ad-

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mission of Candler, that such was the true balance, and that Williamson was, at the instance of Candler, indicted for perjury, in testifying to that admission,—Candler, on his oath, before the Grand Jury, denying the same to be true. And he stated further, that Candler had sworn, upon the trial of Williamson, on the indictment against him, that he, Candler, did not know Williamson, and had never before seen him; whereas, he, Petit, knew Williamson to have been intimate with Candler, and had often seen them together. And he further stated, that Candler admitted to captain Griswold, in London, that he claimed only about twenty pounds of Petit, and also admitted to captain Augustus H. Griswold, in London, that Petit owed him about twenty pounds sterling.

The false swearing which this testimony charged upon the plaintiff, was the wilful misstatement of the true amount of his demand against Petit; and his denial of all personal knowledge of Williamson, with whom he is alleged to have been intimately acquainted.

The whole current of the oral evidence, adduced by his agency to the inquest, tended to the support of that accusation. No part of the parol testimony went to establish the charge, either of his denial of his supposed meeting and interview with Williamson, on the Royal Exchange, in London, 1823, or the denial of his alleged admission in conversation with Williamson, that Petit was indebted to him in the sum of only twenty-three pounds sterling, or thereabouts, which are made, by the Grand Inquest, the foundation of the bill of indictment against him.

It is apparent, then, that the charges of perjury preferred against Candler by Petit, before the Grand Jury, were essentially different from those stated in the bill of indictment found by that body. But the affidavit of Williamson was introduced into the jury room; and the two members of the jury, who were called as witnesses, state that it was acted upon by the jury as part of the evidence before them, and had an influence upon their decision. This affidavit had been previously made the ground of the unsuccessful application to which I have before adverted, for the indictment of Candler for perjury on the trial of Williamson, and remained in the possession of the District Attorney.

By it Williamson deposed, that Candler, on that trial, had sworn that he never saw him, Williamson, in the city of London, and did never admit to him that Petit was indebted only twenty three pounds sterling to him, Candler, or any thing to that effect; and that such statement so made, by Candler upon oath, was in all respects false.

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This affidavit of Williamson, who died before the complaint of Petit was preferred, was sent to the Grand Jury by the District Attorney ; and it became a question, on the trial of the issue, between the parties to this suit, whether Petit, the defendant, caused or procured that paper to be laid before the Grand Jury, or was conusant of its being there ? On this point, the District Attorney testified, that when the complaint of Petit against Candler was pending before the Grand Jury, Wm. M. Price, Esq., as Petit's counsel, in the presence of Petit, or afterwards, requested that the papers should go before the Grand Jury ; that he, the witness, knew of no papers belonging to the case, but the affidavit of Williamson, and that in consequence of the request of the counsel, that affidavit was sent by him to the Grand Jury. He further stated, that it was afterwards returned to him by the jury, with directions to prepare a bill ; and that upon that affidavit, and that alone, he drew the bill against Candler.

This statement comes from the plaintiff's witness, on his examination in chief; and it conclusively shows, that the indictment was based upon the written evidence of Williamson exclusively, and not in any degree upon the complaint, or oral accusations of Petit, the prosecutor, or the witnesses of his procurement. It is equally manifest, from the testimony in the cause, that the oral examinations before that tribunal, did not sustain, and were not offered for the purpose of establishing the specific charges set forth in that indictment.

But the Grand Jury had before them both the affidavit and the oral testimony of the prosecutor and his witnesses ; and the jurors may have formed their opinion of the apparent guilt of the accused, on the testimony of the witnesses, or on the combined force of that evidence and the affidavit, conjointly.

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But, whatever may have been the grounds of their opinion, the District Attorney, on whom the duty devolved to draw the bill of indictment, took the affidavit for his guide, and framed the indictment solely upon the charges it preferred; and the Grand Jury, by finding it, in its present form, a true bill, have indicted the accused, as being guilty of the false swearing imputed to him by Williamson, and not for the specific perjury charged upon him by Petit, the prosecutor; and, unless Petit is chargeable with the introduction of the affidavit of Williamson, as evidence before the Grand Jury, and has thereby implicated himself in the truth or falsehood of the statement it contains, how is he to be made responsible for the injurious consequences of those charges to Candler, the plaintiff? I observe that Petit is not represented by any witness, as adverting to that affidavit, or as availing himself of the matters it contains, in any part of his examination before the Grand Inquest. He is silent in regard to it, and would seem to be unaware of its presence before them. The same remark applies to all the other witnesses. The affidavit, or its contents, are not noticed by any of them. Petit was a volunteer in his complaint to the Grand Jury. His avowed object was to procure an indictment against Candler, and he was actively engaged in accomplishing his purpose.

If he had relied upon the affidavit of Williamson, as material to his success, would he not have pressed it upon the attention of the jury? It is difficult to reconcile his entire neglect of that paper, with the belief of his agency in its introduction as evidence; and the more obvious solution of his silence would seem to be, the supposition of his ignorance of its production.

But the testimony of the District Attorney is relied on, as establishing conclusively the agency of Petit in the introduction of that affidavit to the notice of the Grand Jury, as evidence in support of his complaint. The testimony of the District Attorney is, that he was requested to send the papers to the Grand Jury, and that in compliance with that request, knowing of no other paper, he sent the affidavit of Williamson. At first his recollection was, that the request came from Mr. Price, the counsel. But Mr. Price, being called as a witness, stated that he had never made any such

request; and the District Attorney, upon his further examination, testified that his impression was, that the request came from Mr. Price; but that if Mr. Price did not make it, he is positively certain it must have been made by Petit, the defendant.

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I assume, as the fair result of this evidence, that the request came from Petit, the prosecutor. But it was in general terms, and did not specify the affidavit as one of the papers to be sent. It does not appear that the defendant knew that the affidavit was in the possession of the District Attorney, or that any such affidavit had been made by Williamson, and there is no evidence to show that affidavits or proofs, in support of unsuccessful complaints, come into the hands of the District Attorney, and remain with him. Was the petit jury, who tried the issue, at liberty to infer from the general request, without some such additional evidence, that the affidavit was known to the defendant to be with the District Attorney, and was intended to be called for by him as evidence for the Grand Jury to act upon? Or, could the just inference to be drawn from that request, be so strong as to outweigh the evidence which results from the entire silence of the defendant, and his total disregard and neglect of the paper, when it was there? It was the province of the jury to determine upon the circumstantial evidence before them, whether the defendant had such knowledge, and acted with such intention in regard to the affidavit, as to render him chargeable with its contents, or not. The better opinion appears to the court to be, that the plaintiff could not, upon the evidence of the District Attorney alone, sustain his action upon the first count in the declaration, on the ground of his agency, in causing the affidavit to be sent to the jury, and his consequent liability for the truth of the charges it contains, and which the Grand Jury have incorporated in the bill of indictment, and made the grounds of their accusation.

But, admitting him not to be held answerable for that affidavit, still the indictment was found upon his complaint; and the oral testimony adduced by him, was the efficient cause that induced the Grand Jury to find it. He, therefore, was bound to show that he had probable cause to believe the evidence he gave to be true. His defence was before the jury: he probably failed to convince

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them of the sufficiency of his reasons for believing in the truth of the charges he preferred. Though the court might not disturb the verdict on that ground, yet, as another trial is to be granted, he will have another opportunity of vindicating himself from the charge, and if he succeeds, will entitle himself to an acquittal.

The evidence in support of the second count of the declaration, charging the defendant with the malicious prosecution of the indictment after it was found, knowing it to be groundless, was the affidavit of the defendant to put off the trial of the indictment at the July term of the Court of Sessions, in the year 1828.

It appeared, by the testimony of the District Attorney, that when the indictment against Candler was called on to trial, at the July term of the General Sessions, in 1828, an application was made by the counsel who acted for Petit, to defer the trial until the return of a witness, upon the affidavit of Petit of the absence of the witness, who was stated by him to be material for the prosecution, and was not expected to return until the middle of September, then next. That the indictment was subsequently brought on to trial, at the October term of the court, when the counsel, associated by Petit, with the District Attorney, declared themselves unwilling to proceed to the trial, on the ground that the perjury stated in the indictment differed essentially from the perjury which the prosecution had intended to submit to the Grand Jury; and consequently, the evidence they had to offer on the trial, would not support the charge laid in the indictment: but they explicitly stated to the court, that if the indictment should be so amended, as to present the charges actually preferred by Petit, they were ready and willing to enter upon the trial, and distinctly offered to do so, but that the suggestion and offer were declined by Candler.

The defendant, when he entered upon his defence, called Mr. Price, who testified that he acted as counsel for Petit, the defendant, on the occasion of his preferring his complaint to the Grand Jury against the plaintiff for perjury, and spoke to the District Attorney on the subject, but did not request him to lay the affidavit of Williamson before the Grand Jury. He further testified, that he never saw the indictment against the plaintiff until the day

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before the trial: that he drew the affidavit of the defendant to put off the trial in July, and when he drew the same, he had not seen the indictment, and was ignorant of its contents, but supposed it had been drawn in conformity with the oral testimony before the Grand Jury. That, on the evening before the trial, Mr. Duer and himself, for the first time saw the indictment, and immediately decided that it could not be sustained by the evidence they had to offer: that they communicated their opinion to the District Attorney, but that he persisted in his determination to bring on the cause to trial. That, on the following day, when the District Attorney moved to bring on the trial, they declined appearing as counsel for the prosecution, but distinctly offered to proceed to the trial, provided the indictment should be so altered, as to conform to the oral testimony before the Grand Jury, which offer being refused, they abandoned the prosecution of the indictment.

After the plaintiff first rested the cause, and before the defence was opened, the counsel for the defendant moved for a nonsuit; First: that if the affidavit of Williamson was the foundation of the indictment, the defendant could not be charged as the author, or instigator, of the prosecution; and it did not appear that he had testified to any fact, in support, or in corroboration of the testimony of Williamson: and if the indictment was found by the Grand Jury on the oral testimony before them, then, the bill having assigned the perjury, different from that testimony, the defendant was not chargeable with the consequences of the prosecution, caused by the mistake or error of the jury, or the public prosecutor: and that the affidavit of Petit, to put off the trial, could not implicate him, as a party prosecuting the indictment; because the affidavit showed his ignorance, at the time, of the fact, that the indictment did not embrace the complaint he preferred and supported before the Grand Jury; and the counsel for the prosecution, the District Attorney, and the opposing counsel, must also have been ignorant, or unaware of the specific charge contained in the indictment; inasmuch as the evidence disclosed by the affidavit, and for which the trial was deferred, could not be material to the prosecution of that charge; and because, a prosecuting party is not amenable, and ought not to be held responsible for the mis-

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in which the indictment is to be drawn, or of the District Attorney,  
in drawing up the same.

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The Judge expressed his opinion, that the plaintiff could not recover on the first count of the declaration; which charged the defendant with having falsely and maliciously, and without reasonable, or probable cause, indicted and procured to be indicted, the plaintiff, for the crime of perjury, without further evidence: but, as to the second count, charging the defendant with the malicious prosecution of the indictment, he inclined to the opinion, for the purposes of that trial, that the plaintiff had offered sufficient evidence to support the charge, and he, therefore, denied the motion for a nonsuit.

Further testimony was produced on both sides, which it is not material to state; and the jury, after receiving the charge of the Judge, gave a verdict for the plaintiff, on the two first counts of the declaration, for \$12,500 damages.

Several exceptions were taken to the opinion and charge of the Judge; but, as the court express an opinion on one only of the exceptions, that part alone of the charge will be noticed.

It has reference to the second count of the declaration, charging the defendant with the malicious prosecution of the indictment; and upon which point an opinion was expressed, that if in fact the defendant was under a misapprehension of the specific charge contained in the indictment, or was wholly ignorant of its contents, he is not in judgment of law to be excused from the consequences of prosecuting that indictment. In this direction the court cannot concur.

If the defendant had been apprized of the specification of the perjury, assigned by the Grand Jury, or had been chargeable with knowledge of the contents of the indictment, he would have been answerable for the consequences of the prosecution; and it may be conceded, that if he had volunteered his aid in prosecuting the indictment without knowing its contents, and without inquiry into the nature or extent of the crime it imputed to the plaintiff, he would have been equally culpable, as if he had acted with full knowledge of the charge he was prosecuting, and would have been

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equally liable to answer in damages to the injured party ; because, the grievance to the accused would have been the same ; and the party thus implicating himself as prosecutor, must be considered as intentionally adopting the charge, whether true or false, which the indictment preferred. But no such intendment can be made in this case. The opinion and charge of the Judge, assumed the fact, of the defendant's total ignorance of the contents of the indictment, and misapprehension of the specific charge of perjury which it contained. There was material evidence tending to the conclusion, that such was in fact the case, and that the intention of the defendant was to prosecute the charges he had himself preferred before the Grand Jury, and that he supposed the indictment to have been found for those charges, and not for the false swearing, specified in the affidavit of Williamson. It is not a case of blind or indiscriminate prosecution of the plaintiff, for whatever offence he might be charged with.

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The defendant's purpose was the pursuit of a specific charge, which he had reason to believe was the foundation of the indictment, and he cannot be justly implicated as the intentional prosecutor of a different accusation, in which he had no agency, and which, upon its coming to his knowledge, he immediately disavowed.

The only proof to charge him with the prosecution of the indictment, was the affidavit made by him to put off the trial. But he produced evidence which, his counsel contended, was sufficient to show that he was ignorant of the contents of the indictment when he made that affidavit, and that he did then suppose and believe that the charges it contained, were those which he had preferred, and meant to prosecute ; and the fact, which is in proof, that his counsel was ignorant of the contents of the indictment, and the further circumstance, that the evidence expected from the absent witness, was to establish the charge the prosecutor had preferred, and did not apply to the accusations made by Williamson, are justly urged by the defendant, as cogent arguments of his ignorance of the specifications of the perjury which the bill of indictment contained. Surely then, his testimony to that point was entitled to consideration, and he had a right to the opinion of the

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jury upon its sufficiency to establish the fact on which he rested his defence.

If the jury had been satisfied that he did not intend to prosecute the charges of perjury laid in the indictment; that he had sufficient reason to suppose, and did believe, that the indictment was for the specific offence of false swearing, which he had assigned, and that his intention was to prosecute that accusation, and none other, they ought not to have found him guilty on the second count of the declaration.

But the charge of the Judge precluded all inquiry into the circumstances under which the affidavit was made; and in effect, pronounced the act of making it, for the purpose for which it was used, sufficient evidence to charge the defendant with the consequences of a malicious prosecution, if the charges, contained in the bill of indictment, were groundless, and he had no probable cause for believing them to be true. We think the charge was, in that respect, erroneous; and without expressing any decided opinion upon any other point, we must, for this cause alone, set aside the verdict.

As, however, the merits have been discussed at large with much ability, by counsel, and the attention of the court has necessarily been drawn to some of the prominent features of the controversy, it is deemed advisable to state some of the general views of the court, for the government of the parties.

In the first place, it results from the opinion already expressed, that the defendant is to be permitted to defend himself against the second count of the declaration, which charges him with the malicious prosecution of the indictment, by showing that he was ignorant at the time of its contents, and did suppose and believe it to be founded upon the evidence offered by him to the Grand Jury, and that it was his intention to prosecute the charge which he had preferred, and not the charge which the Grand Jury had made the ground of their bill. But this defence must be proved to the satisfaction of the jury. It is not sufficient for the defendant to aver his ignorance of the contents of the indictment, nor are the court to be understood as intimating that such ignorance, if admitted, would of itself excuse him. He must satisfy the jury that

he was misled by the act of the Grand Jury, in substituting other and different imputations of perjury, for those which he had ascribed to the plaintiff, and that his *bona fide* intention was to prosecute the charges he had preferred, and not those substituted by the jury; that he acted under the conviction, that the indictment was for the charges preferred by him, and that he was warranted in that conclusion, and had no reason for distrusting its correctness. The proof lies upon him; but if he succeeds in establishing to the satisfaction of the jury, that he acted under an ignorance and misapprehension of the contents of the indictment, and upon the intention to prosecute, and the belief that he was prosecuting his own charges, and not those substituted by the Grand Jury, he will discharge himself from liability as the mere prosecutor of an indictment of which he was not the author, under the second count of the declaration.

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But to establish a full defence to that count, the defendant must show, that the information, actually given by him to the Grand Jury, and the evidence laid before them by his agency, was not such as to justify them in accusing the plaintiff of the false swearing specified in the indictment. For, if the finding of the jury, as embodied in the bill, is imputable to his agency, or instigation, he is answerable, both for causing and procuring the plaintiff to be indicted, and for the prosecution of the indictment against him.

This leads us, in the second place, into an inquiry into the considerations connected with the first count of the declaration, charging the defendant with maliciously causing the plaintiff to be indicted.

Two grounds are taken in support of this count. The first, that the affidavit of Williamson, upon which (it is said) the bill was found, was sent by the District Attorney to the Grand Jury, at the request of the defendant: And secondly, that the indictment was found upon his complaint, and by his agency and procurement; that he is responsible, therefore, for the injuries it inflicted upon the plaintiff; and that the mistakes, or errors of the jury, in specifying the charges, and stating the grounds of the accusation he intended to prefer, form

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In the first place, then, if the defendant did direct the affidavit of Williamson to be laid before the Grand Jury, with the intention and design to influence the decision of the Judges upon his complaint, and induce them to indict the accused for the perjury it assigns, he is answerable for the charges the bill of indictment contains, and the jury would be warranted in convicting him on both counts of the declaration. But, whether that affidavit was sent by his procurement, with such intention, or not, is a question for the jury, under the direction of the Judge, upon the points of law it may involve.

The views which are taken by the court, of this branch of the case, have already been stated, and I have but a few brief remarks to add.

The general request to the District Attorney, that all the papers might be sent to the Grand Jury, certainly is evidence bearing upon the question which the jury is to consider; but, standing alone, it would not be conclusive. It admits of explanation which may weaken, or wholly destroy its force. If, for example, the request was made without any knowledge or cause for believing that the affidavit was in the possession of the District Attorney; if that affidavit bore upon it the evidence of the refusal of the former inquest to find a bill upon it, and if any satisfactory reason, having no reference to the affidavit, can be assigned for the general request of the prosecutor, that the papers might be sent to the Grand Jury, the fair presumption would be, that the request was made without any intention or design of bringing that affidavit to the notice of the jury, or making use of it as evidence in support of the complaint. And that presumption would be strengthened by the fact, that no reference was had to it, and no use made of it by the prosecutor, or any of his witnesses, in aid of the oral testimony.

But, if it shall appear that the request, though made in general terms, was understood by the defendant to refer to and embrace the affidavit; if the defendant knew that the District Attorney had that paper in his possession, and that it was embraced in his request,

the inference would be strong, that he intended it as part of his evidence, and the use made of it by the jury, in their deliberation upon the charge he preferred, might implicate him in the results to which it has led. The questions arising upon the introduction and use of this affidavit, are to be submitted with these qualifications, and under these aspects, to the jury, by whom the cause shall be tried, and who will receive such instruction and advice in relation to them, as the evidence may appear to the Judge to call for.

The remaining ground for implicating the defendant in the consequences of the indictment, as the author or instigator of it, under the first count of the declaration, is, the general fact, which the evidence conclusively establishes, that his information was the occasion and cause of its being found.

The two members of the Grand Jury, who have been examined, agree that they were influenced by the oral testimony, in coming to the determination to find the bill, and one of them testifies, that the indictment was founded upon that testimony, though he has no doubt that the affidavit of Williamson had some weight with the jury. The other juror, indeed ascribes much greater efficacy to that affidavit. His testimony is, that it induced the Grand Jury to enter upon the investigation of the complaint.

Whatever the agency was, which the affidavit had in the proceedings of the jury, it was sent by that body to the District Attorney, and was made by him the sole ground of the bill he drew for them; and they gave that bill their sanction. It does not appear that any part of the oral testimony was sent to the District Attorney, and his testimony is decisive, that the indictment was not founded upon that evidence.

The plaintiff's counsel, upon this statement, strenuously contend, that the defendant having, by his complaint before the Grand Jury, and the oral testimony adduced by him, in addition to his own oath, caused the plaintiff to be indicted, he is answerable for the consequences of the prosecution to the plaintiff, notwithstanding the variance between the indictment and the proof; and that the defects of the indictment, or the mistake or misapprehension of the Grand Jury, or the District Attorney, in so framing the

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bill, as to make the specification of perjury, given by Williamson in his affidavit, the ground of the charge, instead of the testimony of the witnesses, who were orally examined by the jury, form no defence or excuse for him.

But the counsel for the defendant object, that he is not chargeable with the mistakes of the Grand Jury, and is not to be held answerable for accusations which were never made by him, or received his sanction, merely because, upon the occasion of his complaint on other grounds, the Grand Jury acted upon charges to which he was a stranger.

The force of this objection is felt by the court, and cases might occur, in which it would be decisive. Where the Grand Jury pass by the charges of the prosecutor, and indict for a different offence, upon other proof not introduced by him; or, where the variance of the indictment from the evidence introduced by the prosecutor, is so wide as to repel the presumption, or belief, that the accusing tribunal was influenced by his information, or acted upon his complaint, he cannot be amenable for the consequences of the indictment to the accused, in an action for a malicious prosecution; but, a discrepancy, or variance between the testimony of the prosecutor, and the specification of the charge in the bill of indictment, where the jury indict avowedly upon the complaint of the prosecutor, and for the offence he imputed to the accused, will not avail the prosecutor, for his defence against his malicious prosecution; and he must still show, that his own complaint, and the charges he preferred, and which led the Grand Jury to indict, were true, or were made upon probable cause, to defend himself against this action. To this latter class, the present case appears to the court to belong. They cannot be unmindful of the fact, that the defendant was the primary and efficient cause of the prosecution. He preferred a complaint before the Grand Jury against the plaintiff, on a charge of perjury, upon the trial of the indictment against Williamson, and the affidavit of Williamson was sent by the public prosecutor to the jury, in consequence of that complaint, on his application for papers, and as a paper called for by him.

Then is it not literally true, that the defendant did cause and pro-

care this indictment to be found against the plaintiff? The charges it contains, vary from the accusations preferred by him; but yet it was his complaint that led to the investigation; and the evidence, elicited by that complaint, and the inquiry consequent upon it, induced the jury to find the bill; and the affidavit, which had been disregarded by the former Grand Jury, or failed to satisfy them, must have owed the credit and consequence it acquired, with the subsequent Grand Jury, to the parol testimony of the prosecutor and his witnesses. This affidavit accused the plaintiff of perjury on the same trial; and the charges it contained, referred to the same point of the plaintiff's testimony, with the oral statements of the defendant.

The charges preferred, before the Grand Jury, by the defendant against the plaintiff, were, that he had sworn falsely in his statement of the balance due to him from the defendant, and in his denial of any personal acquaintance with Williamson. And the charge of Williamson, in his affidavit, was, that the plaintiff had sworn upon that occasion, that he never saw Williamson in the city of London, and did never admit to him, that Petit the defendant, was indebted to him in only twenty three pounds sterling, and that such statement was in all respects false. The crime imputed, by both charges, to the plaintiff, was perjury, committed at the same trial, in his testimony to the same points, namely, his acquaintance with Williamson, and the amount of his demand against Petit, the defendant: yet, the two specifications of the false swearing, of which the plaintiff was accused, though relating to the same subject, differed so widely from each other, that the defendant might possibly be prepared to prove the one, but be unable to substantiate the other. It would be unjust to require of him, to sustain the charge which he never authorized. But the accusation he did prefer, he was bound to justify. And if the statements he made, and which led to the prosecution, were groundless, and his complaint malicious, and without probable cause, justice requires that he should respond in damages, for the injury the prosecution has done to the plaintiff, though the charges inserted in the indictment, found at his instigation, by the mistake, or misconception of the jury, are not in exact conformity

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If then, we are at liberty to decide the question upon principle, we must hold, that he ought not to be required to defend and justify the charges made by the jury, and to which he was not accessory, but that he is bound to substantiate, or show sufficient probable ground for the charges preferred by himself. And this measure of justice may be meted, by holding him responsible for the prosecution, which he instigated and procured to be moved against the plaintiff, but admitting him to show, in his defence, that the charges he really did in truth prefer, were true, or made upon probable cause, and thus to repel the imputation of malice.

The substance of the plaintiff's grievance is, that the defendant, falsely and maliciously, and without probable cause, procured him to be indicted, for corruptly swearing to false statements, on his examination, as a witness, on the trial of Williamson.

The proof is, that the indictment was found against the plaintiff, for perjury, on the complaint of the defendant, charging him with wilful and corrupt false swearing, in his testimony on that trial : and the discrepancy between the evidence and the pleadings, which the defendant makes the ground of his objection, is in the specification of the statement, in which the perjury is alleged in the bill found by the jury to consist. But the evidence fully proves, that the prosecution was solicited and procured by the defendant. He preferred the complaint before the Grand Jury ; he produced witnesses in support of the accusation, and the oral testimony, produced by him, determined the jury to find the bill. The District Attorney expressly stated, that he should have taken no measures towards the indictment of the plaintiff, but from the earnest solicitations of Petit and Cliburn ; and the two Grand Jurors, who were examined as witnesses, concurred in testifying that there would have been no bill found, without the oral testimony, before them, of the witnesses on the part of the prosecution.

Can the defendant then complain, that he is held liable to make reparation for the injury inflicted by his own agency ? Or, shall he avail himself of the objection to the form of the indictment, to escape retribution ? The action against him is, for causing the indictment to be found. The grievance was, the complaint before

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the Grand Jury, and the evidence adduced in support of the charge of perjury preferred by him against the plaintiff. The bill of indictment, was the form given by the jury to the accusation, but, the gist of the action is, the false and malicious accusation of the defendant against the plaintiff, of the crime of which he had no probable ground for supposing him to be guilty ; and it was incumbent on the plaintiff to prove, that such false, malicious and groundless charge was preferred, and that the indictment was the result of that complaint. It is said, that the proof is variant from the charge of which the plaintiff complains. He was bound to prove the falsehood of the charges, preferred by the defendant, and his malice in preferring them. Malice would be inferrable, from the absence of probable cause for believing the charge to be true ; and it might be sufficient, in the first instance, for the plaintiff to show his acquittal, by a jury, of the charge, upon a trial on the merits, to put the defendant upon his defence, and to require him to show, that he had probable cause for believing the accusation to be true at the time it was made.

But to entitle the plaintiff to a verdict, he must prove, that the indictment was found upon the complaint of the defendant, and by his agency and procurement. The evidence before the Grand Jury, upon which the indictment is found, must be disclosed, and it will be open to the defendant to show, that the charges, preferred by him, or which he adduced evidence to establish before the jury, were true ; or, that he had probable cause for believing them to be true. And he will, upon that trial, have the full benefit of his objections, to answer for charges introduced into the indictment, on evidence to which he was not accessory. In this form of proceeding, the whole matter will come before the jury, and the ulterior questions of law to arise upon it, will, on the request of the parties, be reserved for the further consideration of the court.

One further question was raised, to which I will briefly advert.

It will be observed, that two distinct charges of perjury were preferred by the defendant against the plaintiff: one for falsely swearing to a larger demand than he really had against the defendant ; and the other for falsely stating that he had no personal acquaintance with Williamson : and the question is, whe-

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ther the plaintiff must show both charges to be false and malicious, to sustain his action ; or, whether the proof of the falsehood and malice of either is sufficient ; and on this point, the opinion of the court is, that the proof, by the defendant, of the probable cause for believing the plaintiff to have sworn falsely, in denying his personal acquaintance with Williamson, would be no defence for him, against the legal consequences of the falsity and malice of the charge against him, of perjury in his testimony, as to the state of his accounts with the defendant. To secure him a complete defence from them, against the plaintiff's action, as respects that charge, he must prove to the satisfaction of the jury, that he had probable cause, at the time he made it, to believe it to be true ; and if he fails in his justification of that charge, though he may succeed in justifying the other, he will be liable to damages for the injury to the plaintiff, by the prosecution of the charge he is unable to justify.

*New trial granted.*

[D. D. Field, Atty. for the plff. G. Brinkerhoff, Atty. for the deft.]

*Note.*—Upon the new trial, which was conducted before the Chief Justice, upon the principles laid down in the preceding opinion, the plaintiff again obtained a verdict.

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BENJAMIN CORLIES, JOSEPH W. CORLIES AND JAMES MABBIT

versus

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JAMES GARDNER AND GEORGE GARDNER.

The plaintiffs, (auctioneers,) sold to the defendants a quantity of goods, by auction, to be paid for in an approved endorsed note, at six months. The plaintiffs having delivered the goods, demanded the note, which being refused, they immediately commenced an action for goods sold and delivered. The defendants contended that the action should have been special, for the non-delivery of the notes, and that *indebitatus assumpsit* would not lie until the credit had expired.

HELD that the sale and delivery of the goods were conditional, and that the plaintiffs upon the non-compliance with the conditions of sale, by the defendants, might reclaim their goods, or treat the sale as an absolute one, without credit, and bring their action for the price without delay.

ASSUMPSIT for goods sold and delivered. The plaintiffs proved, at the trial, the sale and delivery of the goods to the defendants, (amounting to \$287.32) on the 23d of March, 1829. That the goods were sold by auction, and that the terms of sale were an approved endorsed note, at six months. On the 29th of March, the plaintiffs called upon the defendants for the note, which they refused to give, and on the day following, this action was commenced.

The plaintiffs also proved that when notes were not given according to the stipulated condition, the sale was deemed by them, a sale for cash.

Upon this state of facts, the defendants moved for a non-suit, upon the ground that the action for goods sold, had been prematurely brought. That the remedy of the plaintiffs, if they had a cause for action, was upon the special agreement; that the action should have been for the non-delivery of the note, and that they could not recover for goods sold, until the time of credit had expired.

The Chief Justice (before whom the cause was tried) denied the motion, and a verdict for \$287 32 was returned in favor of the plaintiffs. The defendants having excepted to the opinion of

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*Mr. Joseph Wallis* for the defendants contended.

I. That the action was prematurely brought for goods sold and delivered, as the credit for which they were sold had not expired.

II. That the contract being executory, the plaintiffs ought to have declared specially for the non-delivery of the note, as the agreement made, at the time of the sale of the goods, was open between the parties, and still in force.

III. That the plaintiffs were not bound to deliver the goods, until an approved note was given ; having delivered the goods, they agreed to the time of credit upon which they were sold ; consequently they had no cause of action until the expiration of the credit, except on the special agreement, for not delivering the note.

IV. The evidence of the plaintiff's custom, in considering sales, for an approved note, when the note is not given, as *cash sales*, ought not to have been admitted, as it was not shown that such was the general custom among auctioneers or merchants ; neither was it proved, that the plaintiffs gave such notice to the buyers who attended their sales. [4 *East.* 147. 4 *Bos. and Pul.* 330. *Laws on Assump.* 6. 18. *J. R.* 451. 1 *Coven's R.* 378. 9. 4. *Ib.* 564.]

*Mr. B. Clarke, contra,* for the plaintiffs, contended.

I. That the action was properly brought for goods sold and delivered,—the same having been sold at auction, and the defendants having refused to avail themselves of the privilege of giving an approved endorsed note.

II. The defendants having, on demand, refused the note, they disaffirm any agreement which might be implied, from the terms of sale, and entitle the plaintiffs to declare generally.

III. Sales at auction, upon the terms upon which these goods were sold, are considered cash sales, in case the purchasers do not avail themselves of their privilege of giving approved endorsed notes.

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OAKLEY, J. It is no doubt the general rule, that when goods are sold upon a special agreement, which continues executory, no general *indebitatus assumpsit* will lie. In the present case, however, it is clear from the evidence, that the sale was, in truth, considered a cash sale, unless the buyer should give an endorsed note, at six months. The credit which he was to have, was on condition that he gave the security, and the delivery of the goods was upon the same condition.

Under these circumstances, there can be no question, but that the plaintiffs had a right to reclaim the goods, if they remained in the hands of the defendants, upon their refusal to comply with the conditions of the sale; or to treat the sale as an absolute one, without credit, and to bring their action for the price.

In the cases cited by the defendant's counsel, the sale and delivery of the goods were absolute, but to be paid for in a peculiar manner, at a subsequent period. In this case, the sale and delivery were strictly conditional. If the defendants refused to perform the condition, and still kept the goods, they were bound to pay for them immediately.

*Motion to set aside the non-suit, and for a new trial denied.*

{B. Clarke, Atty for the piffs. J. Wallis, Atty for the deft.}

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1829.

Barrow

v.

Sabbaton.

THOMAS J. BARROW *versus* PAUL A. SABBATON.

Double pleas must be signed by counsel,—and if a default be entered against a defendant, who has served double pleas, without the signature of counsel, the court will not set it aside, except upon an affidavit of merits.

*Mr. Mulock*, in behalf of the defendant, moved to set aside a default entered against him in this cause. He read an affidavit, showing that the default had been entered after the defendant's pleas had been received by the plaintiff's attorney. It appeared that the pleas served were double, a special plea being added to the general issue; but they were not signed by *counsel*. The attorney for the plaintiff had, therefore, treated them as a nullity, and entered a default for want of a plea.

*Mr. D. B. Talmadge*, for the plaintiff, offered to waive the default, if the defendant would file an affidavit of merits; but this was declined by the defendant. *Mr. Talmadge* then contended that the pleas should have been signed by counsel to be regular, and that the court would not set aside the default, except upon proper terms. [He cited *Dubois v. Philips*, 5 J. R. 236. *Satterlee v. Satterlee*, 8 J. R. 327. *Steward v. Hotchkiss*, 2 Cowen's R. 634. *Brewster v. Hall*, 6 Ib. 34.]

*Per Curiam.* By the practice of the Supreme Court, double pleas must be signed by counsel, and those filed by the defendant, are irregular for the want of such signature. The court, in the exercise of its discretion, may, however, set such defaults aside, and will generally do so upon proper cause shown. If these pleas are interposed for delay merely, they are not entitled to favor, and that they are so, the court are compelled to infer, from the fact, that the defendant's counsel refuses to accept the terms proffered by the plaintiff, and file an affidavit of merits. If he is not willing to give this test of the sincerity of his defence, the court will not interpose to correct an irregularity, for his benefit.

*Motion denied, with costs;*

[*E. Curtis, Atty for the plff. W. Mulock, Atty for the deft.*]

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1839.

Jones  
v.  
Archer.

LEONARD JONES versus JEWETT ARCHER.

Where a justice, having decided in favor of the defendant, upon the merits, taxes his costs, but includes in them a part of the costs of the *plaintiff*, and gives judgment for the whole amount, the judgment may be reversed as to the costs, and affirmed as to the residue.

CERTIORARI to review a judgment of one of the assistant justices, in and for the 12th Ward of the city of New-York.

The plaintiff, in error, brought an action of assumpsit in the court below, against the defendant, in error, and declared for work, labor, and materials. At the trial of the cause, several witnesses were introduced by each party, and the evidence upon the merits was contradictory. The justice, after weighing the testimony, decided in favor of the defendant; and upon taxing the costs, he included therein several items of the plaintiff's costs, amounting in the whole to \$4.14. The plaintiff, thereupon, brought the cause before this court by a *certiorari*, and Mr. W. H. Elting, in his behalf, insisted that the judgment was erroneous, both on account of the error as to the costs, and as being against the weight of evidence. [He cited *Dennison v. Collins*, 1 Cowen's R. 111. *Field v. McVickar*, 9 John. R. 130.]

Mr. Cannon, contra, contended that the judgment was according to the evidence; but if it was not, that this court would not undertake to reverse it, where the testimony was contradictory. He insisted that all the costs were to be taxed against the losing party, as a matter of course.

*Per Curiam.* The justice having given judgment for the defendant below, on the merits, taxed his costs, and included in them the costs of the plaintiff, or a part of them, and rendered judgment for those costs in favor of the defendant. This was erroneous, on the authority of the case of *Dennison v. Collins*, [1 Cowen's Rep. 111.] In that case, the judgment was affirmed as to the damages, and

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reversed as to the costs, on the ground that one item in the bill was illegally charged.

Upon the merits, in this case, the justice decided that the plaintiff ought not to recover. There was evidence to support that view of the case, and we do not reverse a justice's judgment, upon the ground that he has decided against evidence, unless the mistake is very clear.

*Judgment reversed as to the costs, and affirmed  
as to the residue.*

[W. H. Elting, Atty for the plff. J. M. Cannon, Atty for the def.]

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1829.

ABRAHAM MITCHELL

Mitchell  
v.  
Roulstone and  
Stickney.

versus

JOHN ROULSTONE AND MOSES P. STICKNEY.

WHERE two or more, are charged as partners, articles of agreement, between them, are admissible in evidence, (although not conclusive,) for the purpose of showing what the true nature of the connexion between the parties was, at the time it commenced; but their declarations made at a subsequent period, would not be admissible.

If evidence, competent at the time it is offered, be objected to, and the objection overruled, become incompetent by subsequent proof, the objection must be renewed, or the party making it will be deemed to have waived his right of excepting.

A joint assump~~sit~~, against two defendants, cannot be supported without evidence, expressed or implied, that both have assented to the contract. If one of the defendants is liable to the plaintiff, and the other admits a joint liability with him, such admission, (although conclusive as to the party making it,) is not sufficient to charge upon the first defendant a joint liability with the second. To permit the confessions of the latter to implicate the former, might be to make a contract for him, to which he never assented, and its practical effect might deprive him of an important witness.

ASSUMPSIT to recover of the defendants certain sums of money alleged to have been loaned to them, as *partners*. Plea, the general issue. At the trial, the plaintiff proved satisfactorily, that he had loaned to the defendant, Stickney, the sum of 520 dollars, at two different periods; and that Stickney promised to repay the money, thus borrowed, as soon as Roulstone, (who was absent at the time,) should return to town.

It appeared by the evidence, on the part of the plaintiff, that Stickney kept a jeweller's shop, in the Bowery, over which was a sign, having his name thereon, as "agent." That he was the son-in-law of Roulstone, (who kept a riding school,) had represented himself to be a partner with him, and that the money borrowed of the plaintiff, was appropriated by Stickney, for the benefit of the concern managed by him, and that Stickney was insolvent.

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— But it did not appear, that Roulstone had any knowledge of the representations made by Stickney, as to the partnership, or that he had given countenance to any such pretension. The plaintiff also introduced some evidence, to prove a general understanding in the mercantile community, that the defendants were partners ; and upon this testimony rested his cause.

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The defendants for the purpose of defeating the action, at least, in its present form, introduced an instrument under seal, bearing date the 4th day of June, 1828, executed by the plaintiff and a number of others, the creditors of the defendants, wherein they had covenanted with *Roulstone*, that if he would pay them fifty per cent. of the amount of the claims set opposite to their respective names, *out of the proceeds of the jewelry, which had been in the possession of Stickney*, or from any other source ; and would divide the proceeds of said jewelry, in case it should amount to *more* than 50 per cent., upon said claims, among said creditors, they, (the said creditors,) would release and discharge him from the various sums specified, “*and from all debts contracted by one Moses P. Stickney, as agent for the said John Roulstone.*”

The defendants also introduced, in evidence, a certain agreement, under seal, executed by one Andrew B. Stimpson of the first part, John Roulstone of the second part, and Moses P. Stickney of the third part, bearing date the 9th day of August, 1826. This agreement set forth, in substance, that Stickney had been engaged in the business of buying and selling jewelry for Stimpson, as his *agent*, receiving a salary for his services, and accounting for the profits of the business ; Stimpson furnishing the necessary capital, and making a proper allowance for expenses, &c. That Stimpson had agreed to sell, and had sold to Roulstone, all his interest in said business, for a sum specified ; that Roulstone constituted Stickney *his agent*, for the purpose of buying and selling jewelry on his account, and agreed to pay him a salary of 1000 dollars per annum for his services, Stickney covenanting on his part, to use his best exertions to conduct the business prosperously for Roulstone, and account to him for all sales, disbursements, &c.

The counsel for the plaintiff objected to these covenants, as evidence at the time they were offered, but their objection was over-

ruled by the Chief Justice, (before whom the cause was tried,) and the instruments were laid before the jury.

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The defendant then introduced several witnesses to prove, that it was generally understood among those who had dealings with Stickney, that he was but an agent for Roulstone, and that they were not considered to be partners.

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Charles Walker, Esq., being also called by the defendants, as a witness, testified that he was the counsel for Roulstone, at the meeting of the creditors, when the aforesaid agreement and release between them and Roulstone was executed; but he refused to disclose what took place at that meeting, as it was called for the purpose of a *compromise*, and under a *pledge*, that *no part of the transaction should ever be used by one party against the other, as evidence*.

Upon this state of facts, the Chief Justice charged the jury, that as the loans from the plaintiff to Stickney were fully proved, and as it also appeared, that the money borrowed had been used for the benefit of Roulstone, by a person fully authorized to obtain it, *his* liability to the plaintiff for the amount of the loans, was fully established; but that the liability of the defendants, in the present action, depended upon the question, whether Stickney was a partner with Roulstone, or his agent merely. That the admissions of Stickney, that he was a partner, though proved, were not sufficient to charge Roulstone, jointly with him, unless the jury were satisfied, that the latter had made the same admissions also. That the evidence, as to the general reputation of a partnership being contradictory, they were to weigh, and decide upon it. That the articles of agreement, between Stimpson and the defendants, furnished evidence to show the real nature of Stickney's powers, and to prove, also, that he was an agent merely, and not a partner. That this evidence would be conclusive, if the agreement represented the facts truly, at the time of its execution, unless the defendants had, by their *subsequent* acts and admissions, held themselves out to the world as partners, or induced the plaintiff to trust them as such. That the agreement and release, executed by the plaintiff, (if admissible as evidence,) contained an acknowledgement, on his part, that the relation between the de-

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fendants, was that of principal and agent, and not that of partners, although he might, at a previous period, have supposed them to be partners. This admission, therefore, was not conclusive, as to the circumstances under which the debt was contracted, but might merely refer to a state of facts, ascertained afterwards, which would not protect the defendants, if they had both held themselves out as partners, or induced the plaintiff to give them credit as such. If the jury believed the defendants to be partners in fact, or if they had both held themselves out as such, or if Stickney had made such representations, with the knowledge and assent of Roulstone, then they were charged to find a verdict for the plaintiff. But if they believed Stickney to be the mere agent of Roulstone, and the latter had not committed himself, as a partner, either by his acts or admissions, then they were to find for the defendants.

The jury returned a verdict in favor of the defendants, and Mr. J. Anthon, for the plaintiff, now moved for a new trial. He contended, I. That the articles of agreement, between Stimpson and the defendants, should not have been received in evidence, being *res inter alios*.

II. That the Judge ought to have charged the jury, that the conditional release executed by the plaintiff, having been made upon mutual concessions, by way of compromise, was not admissible, as evidence, for any purpose. [1. *Phil. Ev.* 83.]

III. As Roulstone was liable to pay the plaintiff's demand, (a point conceded at the trial,) Stickney's admission of his own liability would make him responsible also, and thus established a joint liability against both. [1. *Esp. N. P. R.* 29. 4 *Stark, Ev.* 1071. 10 *J. R.* 66. *Whitney v. Ferris.*]

Mr. George Sullivan, contra, for the defendants, contended, that the agreement was admissible, to show the nature of the contract between the defendants, at the time it took effect, and for this purpose only was it offered. That the release was clearly admissible, at the time it was offered, as it contained an important admission made by the plaintiff. If it became liable to any objection

afterwards, it was occasioned by the facts disclosed by Walker. No exception was taken at the time the objection presented itself, and the plaintiff is too late to take it now. If the representation made by Stickney is conclusive against Roulstone, then any witness, whose testimony is vitally important to the defendant, may escape testifying for him, by admitting a liability, or interest in himself. In this case, Stickney is an important witness, to show the true character of the loans in question, and the action is brought against both, for the express purpose of shutting out his evidence. [8. *Price's R.* 122. 4. *Stark's Ev.* 38.]

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**OAKLEY J.** This is a motion for a new trial, by the plaintiff, on a case made. The first objection raised, is to the admission, in evidence, of a certain article of agreement, between the defendants and one Stimpson, dated the 9th of August, 1826. The action was brought to charge the defendants, as partners, and the agreement in question, was offered, to show what in fact was the nature of the connexion, in business, between them. For this purpose it was competent, though by no means conclusive evidence. The declarations of the defendants, at a period subsequent to the commencement of their business, could not be admitted; but the agreement, in pursuance of which the business itself was commenced, has always been received as competent.

The defendants also offered in evidence, an instrument in writing, signed by the plaintiff, dated on the 4th of June, 1828, in which the defendant, *Stickney*, was stated to be the agent of *Roulstone*. This was objected to by the plaintiff, but admitted by the Judge. No ground for this objection appears, by the case, to have been stated at the time it was made, and the paper, on its face, was clearly competent evidence. It contained an acknowledgment, that *Stickney* was merely the agent, and, of course, not, the partner of *Roulstone*, and being signed by the plaintiff, was manifestly admissible, as his act. The objection to its admission, was, therefore, properly overruled. In a subsequent stage of the trial, it was proved, that this paper was signed by the plaintiff and others, creditors of *Roulstone*, upon an attempted settlement of their demands, and under an understanding, that no admissions,

Oct. Term, or statements, made by either party on that occasion, should be  
1829. given in evidence. It does not appear, however, that when the proof was given, or at any subsequent period of the trial, the Judge was called upon to exclude the paper in question, or that his attention was directed to the effect of this proof upon the question of its admissibility. Under these circumstances, I think the plaintiff cannot now be permitted to object, that the Judge erred in his charge, in submitting the paper to the consideration of the jury. The plaintiff should then have excepted to that part of the charge. If he had done so, there would have been an opportunity (if the objection had been considered tenable) of withdrawing the paper from the jury. A party cannot suffer evidence to be submitted, without question to the jury, take the chance of their verdict being and in his favor, afterwards apply for a new trial, on the ground of an objection made, for the first time, upon the argument of the case. The correct rule is, that if evidence is competent, at the time it is objected to, and the objection is overruled, and it is rendered incompetent by subsequent proof in the course of the trial, the objection must be renewed, or the party must be held to have waived the right to object.

The third and principal objection made by the plaintiff is, that the Judge erred in charging the jury; that the action could not be maintained, on the ground of the admission of the parties, of the fact of partnership, unless they were satisfied that the defendants had both made such an admission. It is conceded, that *Roulstone* is responsible to the plaintiff for the demand, for which the suit is brought, and there is abundant evidence in the case, to show that *Stickney* admitted, and represented himself to be a partner of *Roulstone*. Under such circumstances, the plaintiff contends he is entitled to recover against both, and he relies, for the support of this position, on the case of *De Berkem, v. Smith & Lewis*, [1. Esp. Rep. 29.] In that case, *Lord Kenyon* is reported to have said, "that though in point of fact, parties are not partners in trade, yet "if one so represents himself, and by that means gets credit for "goods for the other, that both shall be liable."

I cannot accede to the correctness of this principle, in the general terms in which it is laid down, if indeed it can be considered

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as applicable to the facts, in the case then before his lordship. If, Oct. Term,  
the party representing himself to be a partner, does so with the knowledge of the other, or if the party obtaining the goods, knows that they are delivered on the faith of a representation by another, that he is a partner, the law may well raise a joint assumpsit against both, though no partnership in fact exists. But I apprehend, that a *joint assumpsit*, against two defendants, can never be supported without evidence, express or implied, that both have assented to the contract. In the present case, the admission by *Roulstone*, that he is liable to the plaintiff, is by no means evidence that he is liable *together with Stickney*. It establishes an individual, not a joint assumpsit. The admission by *Stickney*, of the fact of copartnership, although conclusive as to him, cannot effect the other defendant; for it is well settled, that the confessions or declarations of one defendant, that he is a partner, cannot be used to establish the fact of partnership against another. [*Whitney v. Ferris and others*, 10. J. R. 66. 4. Stark's Ev. 1072.] To permit the confessions of *Stickney* to implicate *Roulstone*, as a partner, would be making for the latter a contract to which he never assented, and the practical effect might be, (and indeed it is suggested, that such is the case in the present instance,) to deprive them of the benefit of using *Stickney* as a witness. A witness is never excluded as interested, on the ground that he has admitted his interest, as that might lead to fraudulent and collusive consequences; and the same principle may fairly be applied, to admissions of a joint liability with others, as the same consequences might follow.

I am of opinion, therefore, that there was no error, in the charge of the Judge, in this respect, and the motion for a new trial must be denied.

*Motion for a new trial denied.*

[*Judah, Atty. for the plff. C. Walker, Atty. for the defts.*]

## CASES IN THE SUPERIOR COURT OF

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1829.

Wilson and  
Hallett  
v.  
Niles and  
others.

ROBERT WILSON AND WILLIAM R. HALLETT

versus

THOMAS N. NILES, PLATT STRATTON, AND THOS. C. WINTHROP.

To an action of debt, on a judgment obtained in the state of Alabama, the defendant pleaded, that he was not within the jurisdiction of the court, at the time the suit, upon which the judgment was obtained, was commenced, nor at any time afterwards; that he did not appear to said suit in person, nor authorize any one to appear for him, and that he had no notice of the pendency of the suit until after the judgment was obtained.

The plaintiffs replied, that by a law of Alabama, it is enacted, "that when a writ shall be issued against all the partners of any firm, service of the same on any one of them, shall be deemed equivalent to a service on all, and the plaintiff may file his declaration and proceed to judgment, as if the writ had been served on each defendant, and the judgment shall be equally valid and effectual on all the defendants." That the cause of action, upon which said judgment was obtained, was a bill of exchange, drawn by the defendants, under their co-partnership firm; that they were, at the time of the drawing of said bill, co-partners, having a house of trade established at Mobile; that the writ on which said judgment was obtained was issued against all the defendants, as co-partners; and that it was personally served on the defendant, Niles, in the county of Mobile.

The defendant rejoined, that the co-partnership had been dissolved before the suing out of the writ, and specially traversed the allegation, that the writ was served on Niles during the continuance of the co-partnership. Upon demurrer to the rejoinder, it was HELD, that the replication was bad. That the law of Alabama could not give jurisdiction over the person of the defendant, who was not within that state; and that the judgment did not, therefore, bind him personally, nor subject his separate property to its power.

**Debt on judgment.** The declaration contained two counts. The first was upon a judgment obtained by the plaintiffs against the defendants, in the Circuit Court of Law of Mobile county, in the state of Alabama, of November Term, 1828, for 6402 dollars and 75 cents *damages*. The second count was on a similar judgment, for 6402 dollars and 75 cents damages, and 21 dollars and 61 cents *costs*,—the costs not forming a component part of the record, but appearing in the execution.

The defendant, Niles, was returned by the sheriff "not found;" but Stratton appeared, and pleaded his discharge, under the act "to abolish imprisonment for debt in certain cases," in order to protect his *person* from the effect of a judgment. The plaintiffs replied to this plea, admitting the discharge, and praying judgment for their debt to be levied, not on the person of Stratton, but on his goods, lands, tenements, &c.

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The defendant, Winthrop, pleaded to each count of the declaration, "that he was not within the jurisdiction of the court of Mobile county, at the time the said suit was brought there, nor at any time afterwards, but was, and is a resident of the city of New-York; that he did not appear in person to said suit, or authorize any one to appear for him, nor had he any notice of the pendency of the suit, until long after said judgment was obtained." [For the form of the plea, see *Shumway v. Stillman*, 4 Cowen's R. 292.]

To this plea the plaintiffs replied, setting forth, in *haec verba*, the 8th section of the act of Alabama, for the better regulation of judicial proceedings, passed the 7th of February, 1818, which enacts, in substance, that when a cause of action exists against co-partners, the plaintiff may sue any one, or more of them. "And when a writ shall be issued against all the partners of any firm, service of the same on any one of them, shall be deemed equivalent to a service on all, and the plaintiff may file his declaration, and proceed to judgment, as if the writ had been served on each defendant, and the judgment shall be equally valid and effectual against all the defendants."

The replication then averred, 1st. That at the time of the drawing of the bill of exchange, thereafter referred to, the defendants were co-partners, having a house of trade, established at Mobile, under the firm of Thoe. N. Niles & Co., within the true intent and meaning of the said act, and that Niles resided there, superintending the affairs of the house.

2d. That the cause of action, upon which the judgment was obtained, was a bill of exchange, drawn by the defendants under their said co-partnership firm, which bill is particularly described in the judgment.

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3d. That the *writ* in the suit, in which the judgment was had, was issued *against all the defendants as such co-partners*, to which writ was subjoined a copy of the bill of exchange, on which the suit was brought, and a written memorandum, stating that the same was brought on said bill; and that said writ was personally served, between its teste and return, on the defendant, Niles, in the county of Mobile.

4th. That at the several times referred to, the act aforesaid was in full force within the state of Alabama, and that the said 8th section, contains all the act relevant to the subject.

To this replication, the defendant rejoined, by setting forth that the co-partnership of the defendants had been dissolved before the suing out of the writ mentioned in the replication, traversing specially, that the writ was served on Niles during the continuance of the partnership, and concluding with a verification.

The plaintiffs demurred specially to the rejoinder, 1. Because it traverses matter not alleged in the replication. 2. Because no proper issue could be taken upon the traverse. 3. Because the rejoinder concludes with a verification, and not to the country. 4. Because the special traverse has no apt or proper inducement;—and, 5thly, because the rejoinder does not negative nor confess and avoid the matter contained in the replication, which it purports to answer.

The defendant, *Winthrop*, having joined in the demurrer, the cause was argued, in writing, by *Mr. Geo. W. Strong*, for the plaintiffs, and by *Mr. G. Sullivan*, for Winthrop.

For the plaintiffs it was observed, in the opening argument, that the Alabama act set forth in the replication, as applicable to the case in question, was the same as our act relative to proceedings against joint debtors, where all cannot be taken, (*1 R. L. N. Y. ed. of 1813*, p. 421, § 13,) the only differences being these:

1st. The Alabama act is restricted to co-partners, while ours extends to joint debtors generally.

2d. The Alabama act gives the *alternative* of proceeding either against *one or more* of the co-partners, or against *all*, and serving the process on *any one* of them.

The latter alternative was adopted in the present case, and herein is the propriety of the averment in the replication, that the writ was issued against the defendants, *under the co-partnership firm*, and that a copy of the bill of exchange was subjoined to the writ. At least, such is the form of the writ, as contained in the exemplification of the proceedings; which shows what is the practical construction put upon the act by the courts of Alabama.

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1. A plea, like the present to a declaration, on a judgment obtained in one of our own courts upon a contract, would be undeniably bad, [*Bank of Columbia v. Newcomb*, 6 Johns. Rep. 98] and the facts disclosed in the replication, place the Alabama judgment upon the same footing, as if it had been obtained in one of our own courts.

II. The rejoinder is clearly bad. 1. It traverses the continuance of the co-partnership at the time when the writ was served on Niles. There is no such averment in the replication.

The averment there, as to the co-partnership is, that it existed at the time of the contract, viz. the drawing of the bill. A traverse, to be properly taken, must be upon some material averment contained in the antecedent pleading. An issue taken upon this traverse, would obviously be a departure from the replication.

2. The continuance or discontinuance of the co-partnership, at the time of the service of process, is not the criterion to test the regularity of the proceedings under the Alabama act.

The language of that act is, "whenever any *cause of action may exist against two or more partners*," &c. It is not, whenever a *right of action does exist against*, &c. The only true criterion, therefore, is the existence or non-existence of the co-partnership, *at the time the contract is entered into*, and to that time the averment of the co-partnership is cautiously restricted by the replication.

Such is not only the necessary legal construction of the act, but it is the judicial interpretation put upon it by the Supreme Court of Alabama, shortly after the act was passed. [*Click v. Click, M. S. Sup. Court of Alabama, Oct. Term, 1822.*]

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*Mr. Sullivan*, for the defendant, Winthrop.

The plaintiffs, merchants of Alabama, were holders of a draft of the defendants;—Thomas N. Niles, residing in Alabama, Stratton and Winthrop, in New-York, but transacting business in Mobile, under the firm of *T. N. Niles & Co.* The plaintiffs commenced a suit on this draft, in an Alabama court, against all the defendants. Niles, residing there, was taken; the other defendants, not being in the state of Alabama, at the time the action was commenced, nor at any time afterwards, were not taken, nor in any manner brought into court. The defendant, *Winthrop*, never was in Alabama at any time, nor does it appear that there was any co-partnership property there, at the time of the commencement of the action, nor any sole property belonging to him. The service of the writ was made on Niles, as one of the firm of *T. N. Niles & Co.*; but that firm had been dissolved before the service; nevertheless, under an act of the Legislature of the state of Alabama, judgment was entered up, as well against *Winthrop*, on whom no service had been made, and who had not been, in any manner, brought into court, as against Niles. It is on this judgment, that the present action is brought, and the plaintiffs seek to enforce, against *Winthrop* here, the judgment recovered in Alabama, where the court, which rendered it, had no jurisdiction over his person, as is admitted by the pleadings, except by virtue and force of the legislative act of the state of Alabama.

The general question is, whether the court, in Alabama, had such jurisdiction of the person of Winthrop in the original action; that the judgment recovered thereon, is conclusive against him; and this question comes up on the plaintiffs' demurrer.

Upon the pleadings, the court, following the usual course, will look at the pleas, in their order, from the beginning, to discover the first defect. To the declaration, as far as it goes, the defendant has no objection. But under the circumstances of this case, in which it is admitted that no service of the writ was ever made on the defendant, Winthrop, nor any previous or contemporaneous notice given of the commencement or pendency of the suit, nor of the rendition of the judgment, it is obvious that the plaintiffs, if

they wished to obtain a judgment on the *merits* of their cause, ought to have declared in such a manner, as to coerce the defendant to put himself on the merits. But as the declaration counts only on the judgment recovered in Alabama, and not on the original cause of action, the defendant was necessarily limited to plead no service of the writ, the want of proper notice of the suit and proceedings in Alabama, and no appearance to the action, in person or by attorney in his behalf. The plea of *nul tiel record* would have been bad, as is decided in *Dando v. Tremper*, [2 J. R. 87.]

The plaintiffs, by pleading over, admit all that is traversable in the defendant's pleas to be true,—for “every pleading is taken to ‘confess such traversable matters alleged on the other side, as it ‘does not traverse.’” [Com. Dig. Plead. Traverse, C. 2. Bac. Ab. Pleas, 322. 386. *Hudson v. Jones*, 1 Salk. 91. *Nicholson v. Simpson*, Fort. 356. *Wilcox v. Servant of Skipwith*, 2 Mod. 4.]

Now the traversable matters, in this plea, are that the defendant was not within the jurisdiction of the court of Alabama, at the commencement of the plaintiffs' suit against him; that he hath not been at any time since, but at the time of the commencement of the suit, and the recovery of the judgment, was, and has been, and still is, an inhabitant of, and resident in, the city of New York; and did not appear in person, in the said suit, nor authorize any person to appear as his attorney therein; nor had he any notice of said action being commenced, till after the time of the recovery of said judgment. These are traversable matters; because if true, they constitute a good plea in bar.

The case of *Borden v. Fitch*, [15 Johns. Rep. 121,] determines the sufficiency of these pleas. And in that case, Judge Thompson, cites with approbation, the case of *Kibbe v. Kibbe*, [Kirby's R. 119,] and the cases of *Phelps v. Halker*, [1 Dall. 261,] *Kilbourn v. Woodworth*, [5 J.R. 41,] *Robinson v. executors of Ward*, [8 J. R. 90,] *Fenton v. Garlick*, [8 J. R. 197,] and *Pawling v. Bird's ex's.* [13 J. R. 192.]

In all these cases, the judgments were recovered without actual notice to the defendants. Attachments of personal property were made in some of them; and, in all, the service of the writ, as be-

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tween the parties, was according to the laws of the state where the judgments were recovered ; but in none of them, were the judgments held binding as against the defendants, who had had no service or notice, or opportunity of making defence; but if the defendants had been, at the time of the commencement of the suit, resident in such states, or citizens thereof, and so amenable to the laws, or had appeared by attorney, and assumed the defence in said suits, the judgment, recovered against them, must have been held effectual in every state. The case of *Shumway v. Stillman* [4 Cowen's R. 292,] settles, definitively the merits of the defendant's pleas ; for in respect to the sufficiency of the plea of non-residence, and want of notice, and no appearance to the action, &c.,—the court held that the defendant must plead those matters, specially, and aver such facts, as would preclude all legal inference of actual defence, and all opportunity of defence to the suit. If, therefore, the defendant's pleas exclude all such inference, they are within the rule, in Shumway's case, and are, therefore, good, and on demurrer must be held so.

But the plaintiffs' counsel, in their second point, insist that this defendant's pleas are bad, on the authority of the *Bank of Columbia v. Newcomb & Stitts*, (6 J. R. 98.) In that case, it appears that Newcomb pleaded *nul tiel record*, and also, that he had not been brought into court, in the original action. The court held, that the want of service on Newcomb, would have been a good defence for him, if properly pleaded, which it was not. This case then sustains the general doctrine, and the converse of the proposition, it was cited to support.

The defendant's pleas then are good, unless the matter in the replication avoids them. The replication, puts the plaintiffs' cause on the Alabama act, and endeavors to show that their case is within it. The Alabama act, as set forth in the replication, is not correctly distinguished in the plaintiffs' argument, from the New-York law of joint debtors. A very material difference, omitted in the plaintiff's argument, is the extent of the liability of the defendants, not taken on the original writs. By the Alabama act, they are liable to the same extent as the partner, who is taken ; but by the law of New-York, the defendants, not taken, are never

liable in their persons, nor is their sole property liable on such a judgment, although judgment may be entered up against joint debtors, so that their joint property may be taken, (24 Sess. chap. 90. sect. 13.) On this comparison of the two acts, the second branch of the plaintiffs' second point, that the Alabama judgment is placed on the same footing, as if it had been obtained in a court of this state, is "*felo de se.*"

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But the plaintiffs' counsel insist, that the Alabama judgments, are to have the same effect in New York, that they would have in Alabama; and therefore, that the defendant is concluded by the judgment, and cannot contest the jurisdiction of the Alabama court. Against this proposition, the defendant's counsel relies upon the authorities he has heretofore cited, as to the general doctrine of the defendant's right to contest the jurisdiction of the court.

But the plaintiffs, insisting that their replication is good, demur specially to the defendant's rejoinder. The rejoinder admits the Alabama act, but denies that the plaintiffs' cause is within its provisions; because, the defendant insisting that the act has no legal effect, but in suits against co-partners, in a subsisting co-partnership, pleads that the defendants' co-partnership, had been dissolved before the service of the writ. The plaintiffs, however, seem to insist by their first cause of demurrer, that the continuance of the co-partnership, at the time of the service, is not material. The construction, resulting from the terms of the act, makes this continuance necessary. It is enacted, that whenever any cause of action may exist, against two or more partners, trading in co-partnership, it shall be lawful to prosecute an action against any one, or more of them. Here it is manifest, that the Legislature contemplated, that the cause of action—that is to say, the action itself, and the co-partnership should be co-existent, and this is corroborated by the expression and "when a writ shall be issued "against all the partners of any firm, service of the same, on any one of them, shall be equivalent to a service on all."

The whole scope of the act of Alabama, is to provide a remedy for the defect of the common law, and enable a creditor to get a judgment which shall be effectual against the property of co-partners, for co-partnership debts. It is obvious, that the policy of the

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act did not extend to other cases, than those of co-partners; and the Legislature did not mean to extend its operation beyond subsisting co-partnerships. This is sufficiently clear, in the replication, to warrant the necessary implication, that the plaintiffs, in their averment of service on Niles, are to be understood, as averring service on him, as a partner, and whatever is necessarily understood, intended, or implied in a plea, is traversable as much as if it were expressly alleged. [2 *Saunders*, 207, notes 21, 22, 29. *Com. Dig. Plead.* 2. 2 *Saund.* 175, no. 1.] In *Stephen on pleading*, the rule is given, that a traverse may be taken upon matter which, though not expressly alleged, is necessarily implied. [1 *Saund.* 312. 2 *Salk.* 629. 1 *Ld. Raym.* 89.] The traverse, therefore, taken by the defendant, that the service was not made on Niles during the continuance of the co-partnership, was well taken, if the continuance of the co-partnership was material, and whether material or not, this court can know only from the replications, which state the law of Alabama; for if a construction had been given, different from the meaning apparent on the replication, the plaintiffs should have surrejoined. But if, on the face of the replication, the continuance of the co-partnership is apparently material, the allegation of the dissolution is thereby made material; but as the mere allegation of the dissolution, without a denial of the allegation of the service on Niles, as a partner, would be an indirect answer to the replications, it was necessary to take a special or formal traverse, to save the argumentativeness of the plea of dissolution. [*Stephen on Pleading*, 220.]

The traverses in the rejoinder must, therefore, be considered well taken, as being of matter that is, by necessary implication, understood to be alleged in the replications. But the plaintiffs seem to pretend that they have not averred the service during the continuance of the partnership; if they have not, and the act requires it, then these replications are bad. If they have not, and the act does not require it, then this part of the traverse is immaterial, and the plaintiffs should have taken issue, as they might in that case consistently with their replications, viz. that the writ was personally served on Niles; for they might have regarded the special traverse as limited to the personal service, it being a denial of the service on Niles, in manner and form as the plaintiffs have alledged.

The second cause of demurrer may be dismissed with the single remark, that it is included in the first, and is a corollary from it ; for if the traverse of the rejoinders is well taken, an apt issue can be taken thereon.

The third cause is answered by *Chitty* and *Stephen*, who state that a special traverse must always conclude with a verification, where new matter is introduced by inducement. [ *Stephen*, 221.]

But the plaintiffs, in the fourth cause, say the inducement is not apt or proper. If the continuance of the partnership is made material by the replication, whether it be so by the law or not, the averment of its dissolution, must be apt and proper.

As to the fifth cause, the rejoinder does confess all that is traversable or material in the replication, except that which it expressly traverses. [ *Stephen*, 255.]

The principal question is not as to the existence of the rule which has been adopted in this state, in respect to the rights of a defendant, in an action on a judgment recovered in another state, to contest the jurisdiction of the court of that state over his person. That is well settled law ; but the question is, whether any Legislative act of another state, respecting the mode of proceeding against absent debtors, can preclude the citizens or subjects of *this* state from the right of contesting the jurisdiction of other state courts, over their persons in actions *here*, on judgments of such courts. And all the first principles of natural justice, sustained by authority, seem to place this question beyond doubt. The questions of pleading are, in a great measure, subordinate to the determination of the main question, and may or not become material, in the decision.

*Mr. Strong*, in reply.

It is objected, on the part of *Winthrop*, that the declaration counts only on the judgment recovered in Alabama, and not on the original cause of action; and that, therefore, he was driven to plead no service of the writ, &c.

It is difficult to conceive how the plaintiffs could have declared both upon the judgment and the original cause of action; for if the judgment be valid, the original cause of action is necessarily

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An obvious and conclusive answer to all the cases cited on the other side, to show that the court must have jurisdiction of the person, in order to render a valid judgment, is to be found in the fact, that in all those cases, a *sole defendant* was proceeded against. If there be not a broad and perfectly well settled distinction in this respect, between the case of a sole defendant, and the case of two or more defendants, our act, relative to proceedings against joint debtors, is a dead letter, and every judgment rendered under it, is null and void. This distinction is founded on reasons of natural justice. Where joint debtors are proceeded against, (and it should be remarked that the Alabama act is full as much restricted in this respect, as ours, it being confined to partnership debts alone,) and one defendant only is taken, no recovery can be had, unless a joint cause of action is proved against all. In this way, the defence of one is made to enure to the benefit of all, and as they all jointly entered into the contract, and each became liable to pay the entire debt, or perform the entire duty, it is but right, that a defence made, or default suffered by one, should, at least *prima facie* conclude the rest. But not so with regard to a sole defendant. If he has had no notice of the suit, either by personal service of process, or voluntary appearance to it, he cannot in contemplation of law, be said to have either made, or to have had an opportunity of making a defence ; nor can a judgment, rendered against him, under such circumstances, be justly taken, as a proceeding *in invitum*.

In this view of the subject, it is quite apparent that the main scope of the argument, on the other side, goes to establish that, should the decision in this very case be in favor of the plaintiffs, no judgment should be rendered against the defendant, *Niles*, who, as appears by the record, was returned not found. But if this court

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is authorized by the act relative to proceedings against joint debtors, to render a valid judgment against him, it is not easy to perceive any good reason why the court in Alabama, being authorized by a similar act, should not have had the power to render an equally valid judgment against Winthrop and Stratton, in the suit brought there, notwithstanding the want of personal service of the process on them.

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Again: it is said that the replications treat the co-partnership of the defendants as subsisting at the time of the service of the writ on Niles. The necessity, or at least the propriety of this averment, is rendered perfectly obvious, by adverting for a moment to the provisions of the Alabama act. That act, as already observed in the opening, contemplates two modes of proceeding against partners, that is, either against any one or more of them, or against all, by serving the process on any one of them. If the first alternative be adopted, and the process be issued against two or more, it is apprehended that a personal service of the process on each defendant selected, must be effected in order to warrant a proceeding to judgment in that suit. If the other alternative be resorted to, as was done in the present instance, that fact should be indicated by the process, and probably by a statement of the nature of the demand on which the suit is brought, showing that it was for a co-partnership demand, as well to apprise the sheriff that he need not make service of the process on any more than one of the defendants, as to authorize the clerk, upon the return of such process served on any one of the defendants, to enter the appearance of all of them. Such was the sole object of the allegation in question, and was taken from the form of the writ, and the memorandum subjoined to it, as contained in the exemplification of the proceedings in the Alabama judgment, and from whence it is to be fairly inferred that such is the usual course of proceeding in such cases in that state.

The pretended averment in the replication so much relied upon by the other side, is, therefore, nothing more than the description given to the defendants in the process in the Alabama suit. And if traversable at all, the only issue which it tenders, is whether the defendants were described in the process, as stated in the re-

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plication. But should it be taken as equivalent to an averment of co-partnership in a declaration, yet that averment is always construed in reference to the cause of action in the particular suit. Where a suit is brought upon a co-partnership debt, and the firm is avowedly dissolved, the defendants are, nevertheless, sued as co-partners, and so averred to be in the declaration, and it would be strange indeed, if the suing them in that character, must be construed into an admission, or a substantive averment, that they are such partners at the time of suit brought. But going even to this extent, does not aid the other side. The imagination must extend one step further, and infer, that the fact of so suing the defendants as co-partners, is equivalent to an averment, that their co-partnership continues down to the time of the service of the process.

But it is said, the Alabama act differs from our act, relative to proceedings against joint debtors;—in addition to the two particulars noticed in the opening argument,—in this, that the former declares the judgment where one defendant only is taken, to be equally valid and effectual against all the defendants; whereas the latter exempts the person and separate property of the defendant not taken, from the operation of the judgment. Suppose, then, the two acts to differ in three, instead of two particulars, how does that fact help the defendant's argument? Will it be pretended, that the Alabama act is, therefore, unconstitutional? That is nowhere insinuated by the opposing counsel, and it is respectfully submitted, whether the court would deem it discreet, to question the constitutionality of a law of a sister state, regulating its judicial proceedings, there daily acted upon, and as old as the state itself. But is not the principle of that act essentially the same as ours? For where is the difference in principle, between taking the *joint* or the *separate* property of a defendant not taken? True, according to our act, the person and separate property of such a defendant are exempt in that particular suit, but the plaintiff, by bringing a suit on that judgment, can readily subject both, nor could the defendant not taken, avail himself of any matter of defence, in such second suit, except "what he might in his distinct individual capacity have made in the original suit."

But if the Alabama act be deemed unconstitutional, this court

surely will not hold it so, except so far as it goes beyond ours. Give it effect then, to that extent, and the plaintiffs are entitled to judgment.

How then stand the merits of the present question? for they appear to lie within a nut-shell—no fault is found with the declaration.—Are the replications good in substance? If the act of Alabama is to have the same effect given to it here as there, and if the Bank of Columbia v. Newcomb, is to be taken as good law, it is not yet perceived wherein the replications are defective, either in substance or form. The question then turns solely on the sufficiency of the rejoinders. It is confidently believed, that they are decidedly bad, among other reasons, for this, that they specially traverse matter no where alleged in the replication, and that matter, too, tendering an immaterial issue. If correct in this position, it surely requires no authority to support it, for it is an elementary principle in pleading, that a special traverse, in order to be good, must be of material matter previously alleged, as much so as the rule, that when a pleading sets forth new matter, it must conclude with a verification, and not to the country. The case of Click v. Click, in manuscript, decided by the Supreme Court of Alabama, as long ago as 1822, upon the very act in question, is deemed decisive, to show that the continuance of the co-partnership, at the time of suit brought, or process served, is wholly unnecessary and immaterial. That case will be found among the papers delivered in this cause.

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The COURT decided, that the replication was bad on the general principle, that the law of Alabama could not give jurisdiction over the person of the defendant, who was not within that state, at the time the suit, upon which the judgment was founded, was commenced, nor at any time afterwards, and who had not in any way submitted himself to the jurisdiction of the court, which rendered the judgment. The judgment, (it was said,) did not bind the defendant personally, nor make his *separate* property subject to it. If he could not by plea deny the jurisdiction of the court, the judgment obtained in Alabama would be conclusive, and would in effect become as extensive as a domestic judgment.

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The case was considered as within the principles of the previous cases of *Harrod v. Barretto*, [vol. 1. page 155, and ante page 302.] and as having been decided in effect, by the Supreme Court, in the late cases before them.—See 6 Wend. R. 447. *Shumway v. Stittman*.

*The court, therefore, gave judgment for the defendant on the demur-  
rer, with leave to the plaintiffs, to withdraw their replication and  
amend their pleading.*

[G. W. Strong, Atty for the plffs.]

FRANCIS A. C. BRICHTA

versus

THE NEW-YORK LAFAYETTE INSURANCE COMPANY.

The plaintiff effected a policy of insurance against fire, on goods contained in his counting-room, and after a loss had happened, he made an assignment of his property for the benefit of certain creditors, and among other things, assigned his claim on the defendants, without their consent. HELD that this transfer did not render the policy void, under the 4th condition of insurance.

Among the items of loss allowed by the jury, were certain advances made by the plaintiff upon some musical instruments, watches, &c., belonging to other persons, which had been deposited with him for sale. As these articles were not stated to be held upon "trust or commission," according to the third condition of insurance, it was HELD that they were not covered by the policy.

THIS was an action upon a policy of insurance against fire. It appeared, that the plaintiff had effected insurance in the office of the defendants, to the amount of 800 dollars, "on furniture and "goods contained in his counting-room, No. 3 Phenix Build.

"ings." At the trial, the plaintiff proved his loss, and the due exhibition of his preliminary proofs; but it appearing that he had, *after the loss took place*, made an assignment of his property for the benefit of his creditors, and among other things, *of his claim upon* this company. The defendants contended, that the assignment rendered the policy void, according to the 4th condition of insurance annexed to it.

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Among other items of loss, the plaintiff claimed, that he was entitled to recover the sum of 280 dollars for damages, to three piano fortas, twenty-four watches, a quantity of watch materials, and some violin and guitar strings, belonging to other persons, which had been deposited with him for sale, and on which he had made certain advances. On the pianos, he had advanced 400 dollars, and the loss upon each was estimated at 20 dollars; on the watches, materials, &c., he had advanced 200 dollars, and these articles were totally destroyed. To reimburse himself for his advances, the plaintiff was to sell the articles deposited with him; but it did not appear that there was any agreement whereby he was to receive a commission for selling them, nor was his business that of a commission merchant.

The defendants contended, that the plaintiff could not recover the amount of his advances on the pianos, watches, &c., according to the third condition of the policy, which provides, that "goods held in trust, or on commission, are to be insured as such," otherwise they are not covered by the policy.

The Judge charged the jury, I. that as the policy was not transferred until after the loss had happened, it was not rendered void by ~~the~~ assignment.

Secondly, that the plaintiff was entitled to recover for the loss upon the pianos, watches, &c., to the extent of his advances thereon.

The jury returned a verdict in favour of the plaintiff, for the full amount of his claims, including the loss upon the articles deposited with him for sale; and the defendants having excepted to the opinion of the Judge, now moved for a new trial.

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*Mr. James Smith*, in their behalf, contended, I. That as the policy was assigned without the consent of the defendants, it became void under the fourth condition of insurance. The Judge should, therefore, have non-suited the plaintiff. [*Lynch v. Dalligan*, 3. Bro. P. Cas. 497. *Park on In.* 596. *Marsh. on In.* 698, 9.]

II. The pianos, watches, &c., were not the property of the plaintiff. They were held by him, as collateral security, for advances made to the owners, and, according to the third condition of insurance, they were excluded from the risk. There is a manifest error, therefore, in the Judges charge, which sustained the plaintiff's claim to the amount of his advances.

*Mr. S. P. Staples*, contra, for the plaintiff, insisted, That the assignment of the policy, was not such a transfer of it, as was provided against, in the conditions of insurance. It was the transfer of a right to recover a loss which had already happened, and it was such a claim, as ought in equity to pass to the plaintiff's creditors. [1. *Pick. Rep.* 76.]

II. The plaintiff was entitled to recover for his advances on the goods, which were held by him, as security for his money loaned, to the amount of his interest therein, at the time of the loss. [*De Forest v. The Fulton Fire Insurance Co.* 1. *Hall's R.* 84.]

*Per Curiam*. The plaintiff effected a policy of insurance against fire, with the defendants, "on goods and furniture contained in his "counting-room." After a loss had happened, he made an assignment of his property, for the benefit of certain creditors; and assigned, among other things, his claims on the defendants. The defendants now contend, that this assignment rendered the policy void.

The restriction in the policy, against an assignment of the interest of the assured in it, without the consent of the company, evidently applies to transfers made before the loss happens. After that event, the rights of the plaintiffs are fixed. His claim becomes a mere chose in action, and like any other chose in action,

it is assignable in equity. The reasons, which induce the Insurance Companies to insert the restrictive clause in their policies, have no existence, or application after the risk has ceased.

Among the items of loss allowed by the jury, were the advances made by the plaintiff on certain piano fortés, watches, &c. The Judge charged the jury, that the plaintiff had a right to recover to the extent of his advances on those articles, and the defendants insist, that the charge was in this respect erroneous.

The third condition annexed to the policy, declares, that "goods held in trust or on commission," shall not be covered, unless they are insured as such. The articles in question, were not the property of the plaintiff; they were held by him "in trust or on commission." He had a lien upon them for advances, which could have been defeated, by a repayment of the money advanced. His interest was not absolute, but conditional; and it could not be covered by a mere insurance upon his own property. If the goods in question were to be covered by the policy, they should have been specified in it as goods held in trust or on commission, and it would be violating the plain terms of the third condition annexed to the policy, if this claim were to be allowed. The Judge's charge was, therefore, in this respect erroneous, and there must be a new trial, unless the plaintiff will strike from the amount of his verdict, the advances upon the property deposited with him. In that case, the verdict for the residue may stand, and the plaintiff can enter up his judgment for that amount.

*New trial granted, unless the plaintiff comply with the condition expressed in the opinion of the court.*

[James Smith, Atty for the defendants.]

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GERTRUDE VULTEE, administratrix of FREDERICK VULTEE, deceased, plaintiff in error,

versus.

DAVID RAYNER, defendant in error.

The plaintiff in error, being sued, in the Marine Court, as administratrix of her husband, on a promissory note made by him, pleaded *non-assumpsit* and *plene administravit*. To support the last plea, she called her son, as a witness, and offered to prove by him, the payment of certain of the debts of the intestate by her, in the due course of administration ; and by another witness, that the estate had been overvalued.

The defendant in error, contended that the administratrix must first produce the inventory of the estate, before she could offer such evidence ; and the court below, rejected the testimony as incompetent. HELD that the burthen of the issue was on the plaintiff in the original suit, who should have produced a copy of the inventory from the public records, if he wished by it, to charge the administratrix with *assesta*. HELD ALSO, that although no person can be a witness to increase a fund, in which he is intrusted, yet, that the son of the administratrix was competent to answer the questions proposed to be put to him.

CERTIORARI from the Marine Court. The defendant below, was sued as administratrix of her husband, on a promissory note, for 50 dollars, made by him, in his lifetime, in favor of Garrit Gilbert ; and endorsed by him to Rayner, without recourse. The defendant pleaded *non-assumpsit* and *plene administravit*. The signature of the deceased, being proved, the defendant called witnesses to show that certain debts due from the deceased to them, had been paid by her ; and her counsel inquired of one of them, (who was an appraiser of the estate,) whether the goods specified in the inventory had not been overvalued : intending to show that the estate of the husband, had all been consumed in the payment of his debts. The plaintiff below objected to the question, and insisted that the defendant, was bound to produce the inventory. This objection being sustained, the inquiry was excluded.

The defendant then called Henry V. Vultee, a son of the defendant and the deceased, as a witness, and proposed to show by

him, that she had paid certain other debts of the intestate, in the due course of her administration. The plaintiff again insisted, that the inventory must be produced, and contended that the witness was not competent to answer the questions proposed to be put to him. The court having sustained the objection, and excluded the evidence, the jury returned a verdict, in favor of the plaintiff, for 67 dollars; and the court gave judgment in his favor for that amount.

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A certiorari having been taken out by the administratrix, *W. Mulock*, in her behalf, now moved to reverse the judgment, and insisted that the testimony of H. V. Vultee, was improperly rejected. The witness was not called to affect the assets of the estate, by his evidence, or to procure or prevent a judgment, for or against it; but to show that the defendant below, had acted honestly in the discharge of her duties, as administratrix, and had employed the assets entrusted to her, in the payment of the debts of the intestate. The interest of the heir, he said, is merely contingent. A legal proprietor stands between him and the estate, and he could not by possibility be benefitted, until the plaintiff's claim was satisfied. He was not called to impeach the debt, or show its payment, but to give evidence, which, while it would tend towards the protection of the defendant, would also tend to cut off the witness from his expectancy.

II. In order to charge the defendant below, the plaintiff was bound to show that she had assets. This he could have done by producing a copy of the inventory; but not choosing to do so, the defendant herself shows, by parol, what the estate was in fact, and offers to prove how it had been disposed of. This testimony, the plaintiff could meet by other proof, but he could not compel the defendant to produce the inventory, which he should have brought into court, if he intended to charge the defendant with its amount. [*Bently v. Bently*, 7 Cow. R. 701.]

*Mr. O'Connor*, contra, for the defendant in error, observed, that the question, as to Vultee's competency, was not to be discussed.

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Vultee  
v.  
Raynor.

The court below decided, that the *evidence* offered was incompetent, not the witness. If the matters to be proved were improper, the witness ought not to have been sworn. The court, therefore, rightfully rejected the evidence which the witness was to furnish. *Thompson v. Gregory*, [4 J. R. 83.]

II. The court were also correct, in refusing to permit the defendant below, to impeach the inventory by the appraiser. If it could be impeached, it should first have been produced. When a plaintiff, on a plea of *plene administravit*, shows assets in the hands of the personal representative; the latter, if it appear, that there was an inventory, with an appraisal, ought not to be permitted to go into proof of his administration of the assets, without first producing the inventory, which is the proper and legal evidence of the amount received by him.

**OAKLEY** J. The defendant below, was sued as *administratrix* of her husband: she pleaded *non-assumpit* and *plene administravit*. On the trial the plaintiff contended, that she was bound to produce the inventory, which had been made of the estate, and that she could not offer any proof under her second plea, until she had done so.

The burden of proof, under this issue, was clearly on the plaintiff below. The inventory was matter of public record, and might have been produced by him, to charge the defendant with assets; this has been expressly adjudged. [*Bentley v. Bentley*, 7 Cow. 701.]

The defendant below offered Henry Vultee, as a witness. He was one of the children of the intestate, and of course, entitled to a distributive share of his personal estate. He was offered to prove the payment of debts by the defendant, in the due course of administration. He was rejected as incompetent.

It seems to be a general principle, that a person cannot be a witness, to increase or to prevent the diminution of a fund, in which he is to participate, and upon this principle I should have considered this witness as incompetent, if called upon to testify generally in the cause. [5 J. R. 258. 1 Mass. 239. 2 Day.

466.] Here, however, it is quite apparent, that the witness had no interest in the question, which was proposed to be put to him; for if the plea of *plene administravit* had been sustained, the plaintiff below, would have had judgment for assets *in future*. I see, therefore, no objection in principle to the competency of the witness, to answer the questions proposed to be put to him. (4 *Cranch. R.* 69. 4 *J. R.* 293.)

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v.  
O'Shiel.

*Judgment reversed.*

H. V. Vultee, Atty for the plff. in error. C. O'Connor, Atty for deft. in error.

#### HENRY O. DUSENBERRY versus WILLIAM O'SHIEL.

In an action of covenant, it appeared that one Pepper hired a house of the plaintiff, and that the defendant agreed to become his surety for the payment of the rent. P. executed a covenant under seal for the payment of the rent, and the defendant on the same paper, executed an agreement also, under seal, to be his surety, but there was no witness to the signature of either. Pepper took the paper containing both agreements, for the purpose of delivering them to the plaintiff, who, upon inspection, objected to the form of the execution of the covenant by P., because there was no witness to his signature. P. therefore erased his signature and wrote his name anew, in the presence of a witness, who signed it, and the paper was then delivered by P. to the plaintiff. The defendant was not present at this transaction, nor did he know any thing of it; but being sued upon his guaranty, he contended that the erasure of the signature of P. under the circumstances of the case, discharged him as surety.

Help, that the signing and sealing of the covenant anew by P. was to be considered as an original execution and delivery of it. That the defendant by signing the guaranty on the covenant itself, and entrusting it to P., thereby gave him authority to complete the delivery of both instruments. That there was no alteration in the terms of the contract, whereby the surety could be prejudiced, and that he was therefore bound by it.

THE facts of this case sufficiently appear from the opinion of the court, and the preceding marginal abstract. It was an action of covenant for rent, tried before Mr. Justice Hoffman. At the trial of the cause, the plaintiff having shown the circumstances of the transaction, and having proved the handwriting of the defendant,

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(there being no witness to his actual signature,) the defendant moved for a non-suit upon two grounds first, because the name of Pepper had been erased after that of the defendant was signed and secondly, because the execution of the instrument by the defendant was not legally proved.

The Judge ruled however, upon the first point, that the executing of the instrument, amounted to a mere acknowledgment of it, for the purpose of having it witnessed, and that a witness to a sealed instrument was not absolutely necessary, such witness being chiefly useful in proving a delivery of it. That the possession of the instrument by the plaintiff under the circumstances of the case, was sufficient to warrant them in finding that it had been duly delivered.

The defendant having excepted to the ruling of the Judge, the jury found a verdict for the plaintiff.

The defendant now moved to set the verdict aside, and for a new trial.

*Mr. Mulock*, for the defendant, contended, that the original instrument was cancelled, and that the erasure of the name of Pepper, by the direction of the plaintiff, and the re-execution of the covenant, without the knowledge or assent of the defendant, discharged him. [He cited 2. T. R. 366. 10th Cokes' R. 92. 4. J. R. 84. 15 Ib. 593. Cro. Eliz. 626. 3. Dyer 261. b. 6 Mod. Rep. 237.]

*Mr. J. Anthon, contra*, insisted, that the act of Pepper, in writing his name anew, in the presence of a witness, was a mere re-acknowledgment of the instrument prior to its delivery. There had, as yet, been no delivery; the signature of the defendant, to that part of the contract which bound him, was tantamount to a power given to Pepper, to bind him by a future legal delivery of the instrument. The act of Pepper was, a part of such delivery, and the charge of the Judge was in all respects, correct. [He cited 4. J. R. 54. 18 Ib. 499.]

**OAKLEY J.** This was an action of covenant. It appeared in evidence, that one Pepper hired a house of the plaintiff, and that the defendant agreed to become his surety for the payment of the

rent. Pepper executed a covenant for the payment of the rent, under his seal, and the defendant also executed, under his seal, an agreement to be surety therefor, which agreement was on the same paper with the covenant of Pepper; but there was no witness to the signature of either. Pepper took the paper, containing both covenants, to the plaintiff, to deliver them to him. The plaintiff objected to the regularity of the execution of the covenant by Pepper, because there was no witness to his signature. He, therefore, erased his signature and wrote his name anew, in the presence of a person who signed it as a witness, and the paper was then delivered by Pepper to the plaintiff. The defendant was not present at this transaction, nor did he know any thing of it. He now contends, that the erasure of the signature of Pepper, under the circumstances of the case, discharged him as surety.

If the covenant between the plaintiff and *Pepper* had been completed, by the delivery of the deed, and there had been a subsequent erasure of the signature, perhaps the re-execution of it, by *Pepper* would have created a new contract, to which the defendant would have been no party. But in the present case, the covenant of *Pepper*, which the defendant guarantied, had never been executed. The plaintiff objected to accept a delivery of the deed, on the ground of a supposed defect in the mode of execution. The signing and sealing of it anew, was then nothing more than an original execution and delivery of the covenant. The defendant, by signing the guaranty on the covenant itself, and entrusting it to *Pepper*, thereby gave him authority to complete the delivery of both instruments to the plaintiff. There was no alteration in the terms of the contract. The surety, therefore, could not be prejudiced, nor can he say that the covenant is not such as he intended to guaranty.

*Motion for a new trial denied.*

[W. Mulock, Atty for the def't.]

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O'Shiel.

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1833.

Wheelwright  
v.  
Beers.

JOHN WHEELWRIGHT versus JOSEPH D. BEERS.

In an action of covenant on a charter-party, the declaration set forth, that the defendant had stipulated, that a vessel, of which he was the owner, should perform a voyage from N. Y. to Omoa and back, for the plaintiff. That all the covenants, on the part of the plaintiff were performed; but that said vessel, instead of proceeding to Omoa, put into the port of Norfolk, and the defendant did not despatch her thence, but neglected and refused so to do, contrary to the effect of the charter-party.

The defendant pleaded six special pleas in bar. The first and second, set forth in substance, that the vessel, while proceeding on her voyage, was so much damaged by the perils of the seas, that she put into Norfolk, as a port of necessity, where the plaintiff took possession of the cargo, and of the same ever afterwards retained possession.

The fourth plea, after admitting the charter-party, the sailing of the vessel, and that she put into Norfolk, &c., alleged that said vessel, while prosecuting her voyage, was so much damaged by the perils of the seas, that it became necessary, that she should put into the nearest port, and that Norfolk was, accordingly selected as a port of necessity. That while there, the said vessel was examined, to ascertain what repairs were requisite to enable her to proceed on her voyage, when it was found necessary, for the benefit of all concerned, that she should be sold, that she was sold accordingly, "and so, and not otherwise, 'the said voyage, was by the mere perils of the sea, broken up.'"

The fifth and sixth pleas alleged, that the plaintiff ought not to maintain his action, because the cargo, mentioned in the declaration, belonged to, and was laden on board of said vessel, for one *John Living*, for whom said charter-party was made by the defendant, as his agent, *as appeared by the oyer thereof*.

Upon *demurrer* to these pleas, the plaintiff had judgment upon the first, second, fifth and sixth, and the defendant upon the fourth.

THIS was an action of covenant on a charter-party, bearing date the 13th of August, 1827, purporting to have been entered into, by and between the defendant, for J. D. Beers & Co., of the one part, and the plaintiff, *as agent for John Living*, of the other part. The charter-party recited, that Joseph D. Beers & Co., being the owners of the brig Champion, had "granted and to freight letten, to the party of the second part, the whole tonnage of that vessel, for a voyage from New-York to Omoa and thence back to New-York;"—and it contained the usual covenants, providing that the vessel should, during the continuance

of the voyage, be made and kept by the party of the first part, "to the best of his endeavors, and at his own proper cost, tight, stanch and strong," and sufficiently provided for such a voyage. The vessel was to receive her cargo at New-York, by a certain day, proceed with it to Omoa, and there take on board a return cargo for New-York; and Mr. Living, was to have a free passage in her to Omoa.

The plaintiff, on his part, was to furnish a specified freight, for the outward, and a cargo of logwood for the homeward voyage. For the use of the vessel outward, he was to pay 450 dollars, and a certain sum per foot, for all the logwood brought home in her.

The declaration contained two counts: the first, after setting forth the terms of the charter-party, and averring a general performance, on the part of the plaintiff, of all things on his part, to be performed, alleged that the plaintiff furnished the said outward cargo, for the vessel, which was on the 27th of August, 1827, received by the master; who, on the same day set sail, and proceeded towards the port of Omoa, &c. The breach assigned was, that the vessel did not proceed to Omoa, but on the contrary, before her arrival at that place, to wit, on the 18th of September following, proceeded to, and stopped at the port of Norfolk, in the state of Virginia; and although the defendant ought to have despatched, and was then and there "required, by the said plaintiff, to despatch and send the said vessel to said port of Omoa; "and although the said vessel ought to have proceeded from said "Norfolk, on her said voyage, yet the said vessel did not proceed, "and the said defendant did not despatch the said vessel, with her "said cargo, on her voyage aforesaid; but on the contrary," the said defendant neglected and "refused so to do against the will of the "said plaintiff, and contrary to the form and effect of the said charter-party, and the covenant of the said defendant in that behalf; "by means whereof, the said plaintiff lost sundry great gains "and profits, which would have arisen from the said cargo, if the "same had been carried to Omoa, and was also put to great expense," &c.

The second count, after setting forth the covenants of the charter-party, and the sailing of the vessel, with her cargo on board,

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assigned as the breach, "that the said vessel was not made and kept by the said defendant, to the best of his endeavors, tight, stanch and strong, and sufficiently manned, tackled, provided and apparelled," "but on the contrary thereof, the said vessel, at the time of the commencement of her said voyage, and during the same, was rotten and unseaworthy, by reason whereof she was unable to prosecute and continue her said voyage, and after the said voyage had been commenced, the same was, afterwards at Norfolk," "on the 19th day of September," "with the consent of the said defendant, and against the wishes of the said plaintiff, broken up and abandoned," &c.

The defendant pleaded six special pleas in bar. The first plea, after admitting the execution of the charter-party, the sailing of the vessel, and that she put into Norfolk, as alleged in the first count of the declaration, set forth as an answer to the breach specified therein, that while the vessel was on the high seas, pursuing her said voyage, she was, by the force and violence of the winds and waves, and by injuries from the perils of the seas, so much damaged that it became necessary for the safety of the vessel, cargo and crew, that she should put into the nearest port, and thereupon the said brig made sail for the port of Norfolk, as a port of necessity, "and arrived there on the 18th day of September, in the year last aforesaid, and the said plaintiff, then and there received and took possession of the said cargo," and ever afterwards kept the same in his possession: without this, that the said brig ought to have proceeded from said Norfolk on her said voyage to Omoa, and the said defendant ought to have despatched and sent said brig with her said cargo on her voyage aforesaid, and that the said defendant neglected and refused so to do, against the will of the said plaintiff," &c.

The second plea, which was to the second count, was exactly like the first, with the exception of the traverse, which, in this plea, formally denied the facts, as stated in the breach set forth in the second count.

The third plea admitted the charter-party, the lading of the cargo on board by the plaintiff, the sailing of the vessel and her putting into the port of Norfolk, as stated in the declaration, but

averred that the said brig, while on the high seas pursuing her said voyage, was, "by the force and violence of the winds and waves, and by damages from the perils of the seas, so much injured in her masts, spars, sails and rigging, and so much strained in her upper works, and injured in her hull," that thereby it became "necessary for the safety of said brig, cargo and crew," that she should put into the nearest port, "and thereafter the said brig made sail for "the port of Norfolk, as a port of necessity, and so, and not otherwise, put into the said port of Norfolk," and arrived there the said 18th of September; and, while at Norfolk, the said vessel "was duly examined with a view to ascertain the repairs "expedient and necessary to enable her to proceed on her voyage," and it was found to be necessary "to sell the said brig for the "benefit of all concerned;" and thereafter the said brig was "necessarily sold, and so, and not otherwise, the voyage aforesaid" "was, by the mere perils of the seas, broken up and prevented; "without this, that the said brig ought to have proceeded from said "Norfolk, on her said voyage to Omoa, and the said defendant "ought to have despatched and sent the said brig, with her said "cargo, on her voyage aforesaid, and that the said defendant "neglected and refused so to do against the will of the said "plaintiff," &c.

The fourth plea, (which was to the second count,) followed the words of the third, down to the traverse, and then concluded by denying that the said brig was *not* made and kept by the said defendant "tight, stanch and strong, and sufficiently manned, "provided, tackled and apparelled, with all things necessary for "said voyage; and that the said brig, at the time of the commencement of said voyage, and during the same, was rotten "and unseaworthy, by reason whereof she was unable to prosecute and continue her said voyage, and that after the said voyage had been commenced, the same was, afterwards at Norfolk, "with the consent of the said defendant, and against the wishes "of the said plaintiff broken up and abandoned."

The fifth plea was to the first count. It craved oyer of the charter-party referred to in that count, and after setting out the covenant at full length, averred that the plaintiff ought not to

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maintain his action, because the cargo, "in the said first count mentioned, was owned by and laden on board of said brig or vessel, for and on account of the said John Living, in the said charter-party named."

The sixth plea was in all respects like the fifth, except that being in reply to the second count, it was properly adapted to it.

The plaintiff demurred to the first, second, fourth, fifth and sixth pleas, and took issue upon the third.

The defendant having joined in the demurrs, the cause was argued by *Mr. John L. Mason* and *Mr. P. W. Radcliff* for the plaintiff, and by *Mr. George Sullivan* for the defendant.

*Mr. Mason*, in support of the demurrs, contended.

I. That the first plea did not answer one of the material allegations in the first count, viz. that the defendant was required by the plaintiff, to proceed on the voyage from Norfolk to Omooa. [*1 Saund. 28, 11 J. R. 19, Satterlee v. Douglass.*]

II. That the affirmative matter, stated as a defence in the first plea, was not inconsistent with the breach assigned in the first count of the declaration. [*Arch. Plead. 207. 9 Johns. R. 186. Mar. In. Co. v. Un. In. Co. 10 East. 378. Hunter v. Prinsep.*]

III. That the inducements in the second plea, did not contain matter sufficient to defeat the plaintiff's action; and that an issue upon that matter, would be an immaterial one. [*Arch. Plea. 235.*]

IV. That the fourth plea was defective inasmuch as it does not expressly state, that the sale of the vessel was rendered necessary, by the damage she sustained from the perils of the seas; nor does it state any facts, from which such a conclusion can legally be drawn.

V. That the fifth and sixth pleas are clearly bad. The charter-party was entered into by John Wheelwright, the plaintiff. The covenants were made by him on the one part, and to and

with him by the defendant on the other part ; John Living could never have maintained an action on the instrument. [Stone v. Oct. Term,  
Wood, 7 Cow. R. 453. 2 Ld. Raymond, 1418. 6 J. R. 94.] 1829.

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*Mr. Sullivan, contra,* contended,

I. That the deed produced varied from that declared on, and that the action could not, therefore, be maintained.

II. That the deed produced, was not the deed of the plaintiff. [Paley on Agency, 153.]

III. That the plaintiff on the pleadings had no cause of action; and that the declaration was bad. That as the demurrs to the pleas were general, the defendant had a right to attack the plaintiff's declaration, and if that should be found bad, or to vary from the deed produced on oyer, the plaintiff could not recover.—The deed declared on (said Mr. S.) is the deed of *John Wheelwright*; but the covenant produced, shows that the plaintiff was but an agent for Mr. Living, and that he executed the deed as such agent. This is a material variance, and fatal; but the deed is in no respect, the deed of the plaintiff; he had no interest in the subject matter of the contract; he was a mere agent for another, who was himself to be on board the vessel, control its operations, and receive the benefit of the voyage. The deed was intended to be the deed of Mr. Living; it should have been executed in his name by the plaintiff, and the latter cannot maintain this action. [6 J. R. 94. 2 Caines 66. 2 Ld. Ray. 1418. 2 East. 142.]

IV. The declaration is bad. It does not set forth enough to form a breach. The allegation, in the first count, that the defendant was required to proceed on his voyage, is wholly immaterial. If the defendant was bound to proceed on the voyage, his being required to do so at Norfolk, could not add to his obligation; and the declaration is not aided by that averment.

V. But it is immaterial, whether the declaration is sufficient or

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not, since the fourth plea is unquestionably good. It is in form and substance like the third plea, on which the plaintiff has taken issue. If the fourth plea is bad, the third is bad also; but the plaintiff has prudently taken issue upon that, and now makes an experiment, in the success of which he betrays a want of confidence.

The fourth plea admits, that the voyage was begun in good faith, and sets forth a sufficient reason why it was not prosecuted to a conclusion; it states, that the vessel being injured on her voyage, by the perils of the sea, was compelled to put into Norfolk, as a port of necessity, where she was examined; upon such examination, it was found necessary to sell her, and she was sold accordingly, for the benefit of all concerned. This plea also asserts, that the voyage was broken up by the mere perils of the sea, and denies that the defendant had not done all in his power to make the vessel stanch and strong, and denies that she was unseaworthy at the commencement of the voyage. The defendant by demurring, has admitted the truth of the plea, and has admitted also, that the voyage was broken up by the mere perils of the sea; and that the vessel being pronounced unable, from sea damage, to pursue her voyage, had been sold. If the plaintiff, by the pleadings, does not admit that the vessel was seaworthy at the commencement of her voyage, still the defendant has denied that she was *not* seaworthy at that time, and has therefore asserted the fact. It clearly then appears, that the voyage was broken up by no fault of the defendant, but from causes beyond his control. The misfortune falls upon him, under any aspect of the case, with sufficient severity,—for he is deprived of all freight, and his vessel is sold, as being unable to complete her voyage. The plaintiff on the contrary, received his goods, at Norfolk, in safety, and has little cause to complain.

*Mr. Radcliff*, in reply, was requested by the court, to confine his remarks to the *fourth* plea. In relation to the first and second pleas, therefore, he merely observed, that there was not enough stated in them, to enable the court to determine any material question, which the defendant sought to raise therein; they merely asserted, that the plaintiff received his goods at Norfolk,

without stating any reason why the voyage was not prosecuted to its termination. The plaintiff, for ought that appears, took possession of his goods at Norfolk, because they were abandoned by the defendant, and no inference at all, prejudicial to his claim, can be drawn from the facts of his having taken possession.

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As to the parties to the contract, it is clearly a covenant, he said, between the plaintiff and the defendant personally ; no other persons are bound by it, but each of the contracting parties has made *himself* responsible for his covenants. An action in the name of *Living* could not be maintained, and of course, the present is well brought in the name of the plaintiff.

With regard to the fourth plea, it has not answered the allegation of the second count, (which is all important, and upon which the ultimate fate of the case may depend,) that *the vessel was unseaworthy at the commencement of her voyage*. The traverse contained in the plea, will not assist the defendant's direct allegations of facts, nor aid what is defectively stated ; it merely denies, that the vessel was *not* seaworthy, whereas, it should have asserted affirmatively as a fact, that she *was* seaworthy at the commencement of the voyage. In his traverse, the defendant merely *negatives* negative allegations, and nothing is put in issue by them. The traverse merely excludes a conclusion, and is in the nature of a *protestando*. As the plaintiff cannot take issue upon the traverse, so neither can the defendant aid a defective inducement by it. In this case, the inducement is a material part of the plea, and should state all the facts on which the defendant relies. [Arch. Plead. 207, 8. 189, 90. 202. 4. 6. 9, 10. 238, 9. 235.]

The inquiry then is, whether the *inducement* presents a bar to the plaintiff's right of recovery ? It states that the vessel put into Norfolk of necessity ; but it does not state that *that* necessity was occasioned by sea damage. It asserts no fact inconsistent with the allegation, in the declaration, that the vessel was unseaworthy when she left New-York. *Non constat*, but that the very necessity which caused the brig to put into Norfolk, was the direct consequence of her unseaworthy condition when she left New-York ; and we consider the fourth plea, therefore, as insufficient to bar the plaintiff's right of recovery.

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The Court gave judgment for the plaintiff on the first, second, fifth and sixth pleas, and for the defendant on the fourth, with leave to each party to amend his pleadings at discretion; the defendant, by withdrawing his insufficient pleas, and the plaintiff, by taking issue on the fourth plea.

[A. G. Rogers, Atty for the plff. J. L. Mason, Atty for the deft.]

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JOHN WHEELWRIGHT versus JOSEPH D. BEERS.

The declaration in this case, (the same mentioned in the preceding one,) set forth a charter-party, whereby the defendant stipulated, that the brig Champion, of which he was the owner, should perform a voyage from N. Y. to Omoo and back for the plaintiff. It then averred a performance of all the covenants on the part of the plaintiff, and assigned, as a breach of the defendant's covenant, that the vessel did not proceed to Omoo, but put into Norfolk. That the defendant did not despatch her thence, but neglected and refused so to do, contrary to the effect of the charter-party.

The defendant interposed a special plea, admitting the charter-party, the sailing of the vessel, and that she put into Norfolk; but averring that said vessel was so much damaged by the perils of the sea, that it became necessary that she should put into the nearest port, and that she accordingly put into Norfolk, as a port of necessity. That while there, she was examined for the purpose of ascertaining what repairs were requisite to enable her to proceed on the voyage, when it was found necessary, that she should be sold for the benefit of all concerned,—that she was sold accordingly, and so, and not otherwise, the voyage aforesaid, was by the mere perils of the sea, broken up and prevented, "sueque hoc, that the said vessel ought to have proceeded on her said voyage," &c.

To this plea the plaintiff replied, admitting the injury to the vessel, the putting into Norfolk, and the breaking up of the voyage there, but averred that the voyage was not broken up by the mere perils of the sea, &c. "sueque hoc, that the vessel was examined at Norfolk, to ascertain the repairs necessary to enable her to proceed on her voyage," &c., as alleged by the defendant, and concluding to the country.

HELD, that the issue joined by these pleadings, was upon the fact stated in the inducement to the plea, whether the voyage in question was broken up by the mere perils of the sea; and that it involved necessarily, an inquiry, as to the seaworthiness of the vessel;—the special traverse in the plea, and in the replication being considered immaterial and informal.

The jury having returned a verdict in favor of the plaintiff upon this issue, it was also HELD, that the rule of damages to be adopted, was the difference between the prime cost of the cargo at New-York, and the net amount for which the goods were actually sold, after the voyage was broken up, no notice being taken of the loss of the market at Omoo.

Newly discovered evidence, which is cumulative merely, is never the ground of a new trial, especially where a part of it was in the knowledge of one of the witnesses, examined at the trial, but not disclosed by him.

A covenant made by J. W. as agent for J. L., will support an action in the name of the former, although he has no interest in the subject of it; and the declaration may allege the damage to have been sustained by J. W.

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AFTER judgment was pronounced in the preceding case, the plaintiff filed a replication to the fourth plea, and the cause was tried upon the issues tendered by the replications to the third and fourth pleas. The plaintiff's reply to the third plea, admitted, that the vessel, while pursuing her voyage, was, by the force and violence of the winds and waves, and by damages from the perils of the seas, so much injured, that it became necessary that she should put into the nearest port, that she did put into Norfolk, as a port of necessity, and that the voyage from New-York to Omoa, was then and there broken up and prevented. But the replication averred, that the "voyage was not broken up and prevented by the mere perils of the seas," in manner and form as the plaintiff had alleged, "*without this*, that the said brig while at Norfolk aforesaid, was "duly examined, with a view to ascertain the repairs expedient "and necessary to enable her to proceed on her said voyage, and "it was then and there found necessary to sell said brig, for the "benefit of all concerned, and the said brig was then and there "necessarily sold for the benefit of all concerned," and concluded to the country.

The replication to the fourth plea, admitted, that the vessel, while prosecuting her voyage, was compelled to put into Norfolk, as a port of necessity, and that said voyage was then and there broken up; but denied that the voyage "was broken up by the "mere perils of the sea," "*without this*, that the said brig, while at "Norfolk, was duly examined, with a view to ascertain the re- "pairs expedient, and necessary to enable her to proceed on said "voyage, and it was then and there found necessary to sell said "brig, for the benefit of all concerned, and the said brig was then "and there necessarily sold," and concluded to the country.

At the trial of the cause, (which was before the Chief Justice,) the counsel for the plaintiff stated, that under the pleadings, as understood by them, the defendant had admitted the execution of the charter-party, and the commencement of the voyage; but alleged, by way of defence, that *it was broken up by the mere perils of the sea*. That the plaintiff had taken issue on that allegation, and it would appear in evidence, that the voyage was broken up, not by the perils of the sea, but by the unseaworthiness of the vessel.

The counsel for the defendant, in reply to this suggestion, stated that, according to their understanding of the pleadings, the *seaworthiness* of the vessel was *admitted* by the plaintiff, and that the facts to be passed upon by the jury, were set forth in the *formal traverses* contained in the replications.

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The Chief Justice decided, that the issues tendered by the replications, were substantially the same, and that they presented an affirmation on the part of the defendant, and a denial by the plaintiff, that the vessel was compelled to put into Norfolk by the mere perils of the seas. To this opinion the counsel for the defendant excepted.

As the affirmative of the issues was thus cast upon the defendant, he proceeded to call witnesses and produce testimony, to show that the putting into Norfolk, and the subsequent sale of the vessel, were caused by sea damage, sustained by the vessel, between the fourth and eight of September, in a violent gale of wind.

It appeared that a survey was held upon the vessel after her arrival at Norfolk, which, after pointing out particular defects in the vessel, a part of which were the result of sea damage and a part not, concluded by recommending a sale of the vessel for the benefit of all concerned. The principal question of fact, presented to the jury under this part of the case, was as to the seaworthiness of the vessel at the time she left New-York. The testimony of the officers of the vessel, and several others, was very strong, to show that the voyage was broken up by damages received during the gale, while the surveyors and some shipwrights were of opinion, that certain defects, exhibited when the vessel was examined at Norfolk, could not have been the result of sea damage, but must have existed at the time the vessel sailed from New-York, and that these defects rendered it inexpedient to repair the vessel, after the injury sustained from the gale.

It appeared also, that the cargo put on board the vessel at New-York, belonged to one *John Living*, that the plaintiff had no interest in it, but acted as the mere agent for the owner. A part of this cargo, (which was invoiced at 3,744 dollars,) was sold at Norfolk, after the voyage to Omoa was broken up, and the

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remaining parts shipped to the plaintiff at New-York, and sold by him there. The loss upon these sales, including the charges, amounted to 1000 dollars. The plaintiff also called witnesses, to show what the probable amount of the sales of said cargo would have been at Omoa, and the defendant produced countervailing testimony on his side.

Upon these facts, the defendant contended that the plaintiff should be non suited, because it appeared by his own showing, that he had no interest in the cargo, and could not be entitled to recover any damages, for the causes alleged in the declaration. This motion was overruled by the presiding Judge, and the defendant excepted to the decision.

The counsel for the defendant then objected to all the evidence, which tended to show that the cargo belonged to *Living*, upon the ground that such proof did not support the declaration ; but this objection was also overruled.

The Chief Justice charged the jury, that although the issues formed by the pleadings, were not in *form* upon the unseaworthiness of the vessel, yet that they necessarily involved that question. That if the damages, sustained by the vessel, could have been repaired at an expense justifying such reparation, then that the owner was bound to repair and send her on the voyage ; if she could not be so repaired, then that she was lost through the mere perils of the sea, *unless she was so rotten and unsound, as not to admit of the necessary repairs*, in which case the loss could not be imputed to the mere perils of the seas.

Upon the question of damages, the Chief Justice desired the jury, (if they should find a verdict in favor of the plaintiff,) in the first place, to ascertain the difference between the invoice prices of the articles shipped, and the net amount of the sales of the same articles after they were delivered to the plaintiff, or his agents ; and in the second place, the difference between the net amount of said sales, and the prices which the articles would have brought at Omoa, leaving the amount of damages to be fixed by the court upon a case made. This suggestion, as to the damages, being assented to by the parties, the jury returned a verdict for 2,500 dollars in favor of the plaintiff ; estimating the loss of the market at

the port of destination, at 1,500 dollars, and the actual loss by the sale, at 1,000 dollars.

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Either party having had leave to make a case upon the record and facts, the defendant accordingly prepared one, which each party had leave to turn into a special verdict or bill of exceptions.

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The cause was now argued by *Mr. Ketcham* and *Mr. Sullivan*, for the defendant, and by *Mr. Mason* and *Mr. P. W. Radclif*, for the plaintiff.

For the defendant, it was contended, I. That the plaintiff, by omitting to reply to the traverses set forth in the *pleas*, had admitted the truth of the matters therein contained, as stated by the defendant, and that the Judge mistook the issue joined by the pleadings. [Stephen on Plead. 188. 209. 234. 215. 220. 228. 1. Sound. 22. n. 2. 1. Chitty on Plead. 596. 8 Cowen's R. 653. 716. 1. Phil. Ev. 141. 3. Cranch's R. 187. Doug. 733. 3. East' R. 192.]

II. That the declaration was not supported by the proof. The testimony showed that the cargo of the vessel belonged to *John Living*, and not to the plaintiff. The declaration is in the name of *Wheelwright*, and alleges, that the damages were sustained by him; it is not supported by the proof, and the charter-party itself, shows the variance. [1. Liv. on Agen. 12. 6th Binn. Rep. 228.]

III. That the loss of the profits, which might have been realized at Omoa, ought to be deducted from the amount of the verdict. [3. Johns. Cas. 218. 3. Caines' R. 219.]

IV. That the verdict was against the evidence, and that the defendant was entitled to a new trial, upon the ground of newly discovered evidence. [2. J. R. 124.] In support of this last point, the defendant read the affidavit of a witness, examined by him at the trial, stating certain facts, which were omitted by him

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on his examination, and tending to show, that the vessel was sea-  
worthy when she left New-York.

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For the plaintiff it was contended, I. That the issues presented by the replications, were upon the fact, whether the voyage was broken up by the mere perils of the seas; and under those issues, it was competent for the plaintiff to prove, the unseaworthiness of the vessel, and the formal traverses, contained in the pleas, were such as to compel the plaintiff, to traverse the matters contained in the *inducement* to these pleas. [1. *Saund.* 22. n. 2. *Arch. Plead.* 203. 208. *Stephen* 198. 211. 287. 258. 1. *Chit.* 587. 597. *Com. Dig. Pl. C. S.* 13. *Mass. R.* 520. 8 *Cowen's R.* 716.]

II. That whatever informalities or defects there might be in the replications, it was too late after verdict to object to them, especially as the cause had been tried on its merits. [1. *J. R.* 509. *Com. Dig. Pl. C. 1. Chitt.* 623. *Thos. Ray.* 86. 2. *Saund.* 439. 1. *Ib.* 103. n. a. 2. *J. R.* 466.]

III. That the court having decided upon the *demurrer* to the fifth and sixth pleas, that the plaintiff was entitled to sue upon the charter-party, and that John Living was not; it followed, that all the damages recoverable for a breach of the covenant, contained in the charter-party, were recoverable by the plaintiff. [6. *Cowen's R.* 261.]

IV. That the plaintiff was entitled to recover for the loss of profits at Omoa, as well as for the loss attendant upon a resale of the cargo; and that the verdict was supported by the evidence. [8. *J. R.* 164. 213. 14, *Ib.* 170. 15. *Ib.* 24. *Pothier on Ma. Con.* sec. 1. art. 2. p. 30. also, *Poth. on Ob.* 159. *Cushing's Trans.*]

V. That the defendant was not entitled to a new trial on the ground of newly discovered evidence, the testimony offered being that of a person examined on the trial, and cumulative merely, going only to impeach the testimony of other witnesses, and being

otherwise insufficient, and relating to matters in the knowledge of  
the witness, at the time of his examination as a witness in the  
cause. [3. J. R. 269. 8. Cow. R. 223. 4. Johns. R. 425. 5. Ib.  
248. 2 Caines' R. 129. 8. J. R. 64. 15. Ib. 201.]

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OAKLEY J. The first count of the declaration in this case, sets forth a charter-party, whereby the defendant stipulated, that the brig Champion, of which he was the owner, should perform a voyage from New-York to Omoa, and back to New-York. The count avers a performance of the covenants contained in the charter-party, on the part of the plaintiff, and then assigns, as a breach of the defendant's covenant, that the said vessel did not proceed to the port of Omoa, but put into Norfolk, and that the defendant did not despatch her on the said voyage, but neglected and refused to do so, contrary to the effect of the charter-party.

To this count, there was a special plea, which admits the charter-party, the lading of the cargo on board, the setting sail of the brig on the voyage, and her putting into the port of Norfolk, as stated in the count; but avers, that the vessel was so much damaged by the perils of the sea, that it became necessary for the safety of the cargo and crew, that she should put into the nearest port, and that she did put into Norfolk as a port of necessity; that while there she was examined, to ascertain the repairs necessary to be made, to enable her to proceed on the voyage; that it was found necessary for the benefit of all concerned, that she should be sold, and that she was accordingly sold, and that "so, and not otherwise, the 'voyage aforesaid, from New-York to Omoa, was, by the mere 'perils of the sea, broken up and prevented;" without this, that the said vessel ought to have proceeded from Norfolk, on her said voyage, and that the defendant ought to have despatched her on the voyage, and that he neglected and refused so to do, &c.

To this plea, the plaintiff replied, and admitted the injury to the vessel, by the perils of the sea, and her putting into Norfolk as a port of necessity, and that the voyage was there broken up and prevented, but averred, that "the said voyage was not broken up "and prevented by the mere perils of the sea, and not otherwise," in manner and form, as alleged by the defendant, without this, that

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the vessel was examined at Norfolk, to ascertain the repairs necessary to enable her to proceed, and it was found necessary to sell her, and that she was sold as alleged by the defendant, and concluded to the country.

At the trial of the cause, the Judge held that the issue joined by these pleadings was upon the fact, whether the voyage in question was broken up and prevented by the mere perils of the sea, and that it involved necessarily the inquiry, as to the seaworthiness of the vessel. The defendant now contends, that the issue really joined, was embraced in the allegation contained in the formal traverse in the replication, to wit, whether it was found necessary, upon an examination of the vessel at Norfolk, for the interest of all concerned, to sell her, and whether she was sold accordingly, and that by the state of the pleadings, the seaworthiness of the vessel was admitted by the plaintiff. If the position of the defendant is correct, it is clear, that the issue joined is not only an immaterial one, but that there has been no trial of it, and that the present verdict cannot stand.

It seems to be a well settled rule in pleading, that "where a material point alleged by one party, is fully confessed and avoided,—that is, when the other party sets up a matter consistent with such allegation, but which if true is an answer to it, then he cannot also traverse it." [1. *Saund.* 22. n. 2.] In the case now before us, the material allegation in the declaration, assigning the breach of the defendant's covenant is, that the vessel did not proceed to Omoa. The defendant's plea admits the fact, but sets up by way of avoidance, a number of circumstances, all resulting in the general and precise allegation, that the voyage was broken up and prevented by the mere perils of the sea. After thus admitting the actual breach of the covenant, as set forth in the declaration, and setting up a ground of legal excuse for such breach, it was not competent for the defendant, in any special traverse, to question the fact of such breach. Nor do I consider the plea of the defendant as in truth doing so. The special or formal traverse avers, that the vessel ought not to have proceeded on the voyage to Omoa, and that the defendant ought not to have despatched her on such voyage. These averments are clearly matters of law, and are

not under any circumstances traversable, and must be rejected altogether.

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It is further averred, that the defendant did not neglect and refuse to despatch the vessel on her voyage. This allegation is not in terms inconsistent with the fact before stated, that the vessel did not proceed to Omoa, but that the voyage was broken up at Norfolk. It in truth amounts to nothing more than saying, that the defendant did not neglect or refuse to despatch the vessel, because he was released from the obligation to do so, in consequence of the injury sustained by the perils of the sea. If the averment is to be considered as equivalent to an allegation, that the vessel did proceed on her voyage to Omoa, then it is entirely repugnant to, and inconsistent with the previous averments of the plea. The whole plea is founded on the admitted fact, that the voyage was not performed, and the defence is rested on the ground that there was a legal and sufficient excuse for not performing it. I consider the averment, that the defendant did not refuse to despatch the vessel, after admitting that the voyage was broken up at Norfolk, and assigning the fact of sea damage as the reason for breaking it up, as altogether immaterial, and rendered senseless and unmeaning.

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The rule is, that the *inducement* to a special traverse is not in general traversable, yet when the special traverse is not to the point, or substance of the action, or in other words, is immaterial, the other party may pass it by, and traverse the inducement. [Arch. on Pl. 208.] This rule seems to be exactly applicable to the present case. The averment contained in the special traverse, that the defendant did not refuse to despatch the vessel, presented no sensible or material issue to the opposite party, and there could have been no trial, on such an issue, of the merits of the case, to wit, of the sufficiency of the excuse of the defendant, for breaking up the voyage. Under such circumstances, it was proper for the plaintiff to pass by that averment, and take issue on any fact alleged in the inducement, which involved the whole ground of the defence. The fact was, that the voyage was broken up by the mere perils of the sea; on that the

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plaintiff has taken a precise and formal issue, but has added to the replication, without any necessity or object, as far as I can discern, a special traverse, denying the fact alleged in the inducement to the plea, that the vessel was examined at Norfolk, and that it was found necessary to sell her, &c. This special traverse is manifestly as unnecessary and immaterial, as that contained in the plea. It could form no issue upon the merits of the controversy, for it could never have been determined on such an issue, whether the necessity for selling the vessel, arose from sea damage only, or from that and unseaworthiness combined, and a verdict on an issue so framed, would have decided nothing. This special traverse, therefore, in the replication, being informal and immaterial, may be disregarded.

Neither party having demurred to the pleadings of the other, on the ground of informality or repugnance, it is the duty of the court to look at the record as it stands, and ascertain, whether any material issue appears upon it, and if such a one is found, to confine the parties to it on the trial, rejecting all immaterial averments. I think the Judge in the present case, was correct in considering the special traverse, both in the plea and replication, as informal and immaterial, and in confining his attention to the only fact stated in the plea, and put in issue by the replication, which fairly opened the door, for a full investigation of the merits of the controversy between the parties.

I have not thought it necessary to examine the question, as to the fourth special plea, (which is to the second count of the declaration,) and the replication to it. If my view of the issue, under the pleading to the first count, is correct, the verdict being general, and the evidence in the case applicable to it, the plaintiff is entitled to judgment, although no issue, or an immaterial one, was joined under the fourth plea.

The second principal point involved in the case, relates to the rule of damages. It is contended, by the plaintiff, that he is entitled to recover the difference between the prime cost of the goods at New-York, and the net value of them at the port of destination. The defendant contends, that the true rule, is the difference

between the prime cost at New-York, and the net amount, for which the goods were actually sold at Norfolk, after the voyage was broken up.

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In *Watkinson v. Laughton*, [8 J. R. 213,] there was an action of assumpsit on a bill of lading, signed by the defendant as master of the ship. The goods were shipped at Liverpool for New-York, and on the arrival of the vessel, it was found that a part of the goods had been embezzled, but without any fault on the part of the captain. It was contended by the defendant, that the true rule of damages, was the *invoice price* of the goods. The plaintiff claimed their value at New-York. The court held, that the defendant must answer for the goods, according to their clear net value at New-York, and they say, that this rule is in furtherance of the policy of the marine law, which holds the master responsible as a common carrier, and *Spencer J.* remarked, that the policy of the law, in like cases, in making the master liable, is to induce him to employ honest men in his service.

In *Amery v. M'Gregor*, [15 J. R. 24,] the action was assumpsit, on a contract to transport goods from Liverpool to *New-Orleans*. The court, in that case, recognized the rule of damages adopted in *Watkinson v. Laughton*, and sustained the verdict of the jury, which gave the plaintiff eighty per cent. advance, on the invoice prices of the goods, being the value of like goods at *New-Orleans*. In *Brachett v. M'Nair*, [14 J. R. 170,] the defendant agreed to forward, for the plaintiff, a quantity of salt from *Oswego* to *Queenston*. He failed to perform the contract, and the rule of damages, was the difference between the value of the salt at *Oswego* and at *Queenston*, and the court say, that such a rule was no more than giving an indemnity to the plaintiff, for the injury sustained. In these cases, the Supreme Court seem to have settled the rule, which must govern us in the present instance. The contract in the case now before us, was, that the vessel should proceed to *Omoa*, and there deliver her cargo. That was the place to which both parties looked for the completion of the contract, and the direct injury sustained by the plaintiff, was the loss of the increased value of the goods at their destined port. I am unable to distinguish this case, in principle, from those above cited.

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3. The defendant also contends, that the proof in the case shows, that the goods laden on board of the brig, under the charter-party, were the property of one *Living*, and not of the plaintiff, and that there can be no recovery, by the plaintiff, for damages sustained by the failure of the defendant to transport these goods to Omos. This point was formerly before us, in this cause, on a demurrer to a plea, setting up the ownership of *Living* in the goods, and presenting the question directly, whether the present plaintiff could sustain an action, on this charter-party, for the benefit of *Living*. We held that he could. The point having been adjudged in this court, must be considered as disposed of here. If it were otherwise, the question could never arise in the form in which the defendant now presents it. The lading of the cargo on board, by the plaintiff under the charter party, is averred in the declaration, and the fact is admitted in terms by the plea. It would not be competent, under such a state of the pleadings, for the defendant to set up or prove, that the plaintiff had no interest in the cargo.

4. It is also contended, that the verdict is against the weight of evidence. On this head it is sufficient to remark, that there was much conflicting proof, all of which was fairly submitted to the jury, and it is, therefore, a case in which their verdict ought to conclude the parties.

5. The defendant also moves for a new trial, on the ground of newly discovered evidence. Without remarking on the singular circumstance, that the witness, by whom the newly discovered evidence is to be given, did not disclose the facts now sworn to be within his knowledge, at the trial, when he was called to give his opinion as to the state and condition of the vessel, it is sufficient to say, that the evidence which is said to be newly discovered, is strictly cumulative, and cannot, therefore, upon the authority of numerous cases, decided by the Supreme Court, be the ground of granting a new trial.

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That part of the foregoing opinion, which relates to the rule of damages, was the opinion of Judge Oakley merely, and not that of the court. The court gave judgment, in favor of the plaintiff, for 1000 dollars, being the difference between the actual sales

and the invoice price of the goods, the loss of the market at Omoa, being deducted from the verdict of the jury. The loss on the sale of the goods, at Norfolk and New-York, was considered as the true rule as to damages, upon the ground that there was no fault or fraud, on the part of the defendant, from which the loss arose, and that the case shows only a breach of the implied warranty of seaworthiness.

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*Judgment in favor of the plaintiff for 1000 dollars.*

[A. G. Rogers, Atty for the plff. J. L. Mason, Atty for def't.]

*Note.—See Rogers v. Niagara Ins. Co. ante, p. 86.*

#### JOHN FORBES versus ABRAHAM R. LUYSER.

If upon the trial of the cause, the plaintiff refuse to submit his case to the jury, after the testimony is closed, and insist upon being nonsuited, in consequence of the ruling of the presiding Judge upon points of evidence, he will not afterwards be permitted to make a case, on which to found a motion for setting the nonsuit aside.

THIS was an action upon the case for a malicious prosecution. The defendant interposed special pleas, setting forth in substance, that he had probable cause for suspecting the charge made against the plaintiff to be true, and that he was not actuated by malice. At the trial, the presiding Judge decided, that under the pleadings, the affirmative of the issue was assumed by the defendant; and having directed him to open the case to the jury, the plaintiff excepted to his opinion. The parties having proceeded in the trial of the cause, the Judge decided several questions of evidence against the plaintiff, to which exceptions were taken; and after the testimony was closed, the defendant's counsel insisted upon sub-

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mitting their case to the jury under the evidence which had been admitted. The counsel for the plaintiff objected to this course, refused to go to the jury, and insisted, (as a considerable part of the evidence upon which they relied had been rejected,) that he ought to be nonsuited. The plaintiff being called, refused to answer, and was nonsuited accordingly.

*Judah* for the plaintiff, having prepared a bill of exceptions, now moved to set the nonsuit aside. But the court decided, that as the plaintiff had himself insisted upon being nonsuited at the trial, and had refused to put his case to the jury upon the evidence, he could not now be permitted to make a case, on which to found his motion to set the nonsuit aside.

*The motion was therefore denied.*

[*Judah, Atty. for the plf.*]

NOTE.—Vide, 1. Barn. and Ald. 253. 13. J. R. Pratt v. Hull, 334. 5 Burr. R. 2692. 4. Ib. 1984.

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HENRY WHITE versus SAMUEL DEMILT.

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Demilt.

In an action for the breach of the defendant's contract to sell and deliver certain goods to the plaintiff, the *promise* of the latter to *accept* the goods and *pay* for them, is a good consideration for the defendant's promise to *deliver* them.

When the plaintiff, by the terms of his contract, is to pay for the goods in his own promissory notes, at different dates, it is not necessary for him to aver in his declaration, a formal *tender* of the notes. It is sufficient if he allege his readiness to accept the goods and pay for them in the manner agreed upon.

The first four counts of the declaration, stated the damages, resulting from the breach assigned, to consist in a loss of the *profits* of the purchase; but there was a general averment of *pecuniary* damage at the conclusion of these, as well as the common counts. Upon demurrer to the first four counts, for the want of proper averments of tender and damage, it was held that the allegation of special damage at the end of each count might be considered at surplusage, and that the general averment of damage, at the conclusion of the declaration, was applicable to each separate count.

THIS was a special action on the case for the non-delivery of certain goods, bargained and sold by the defendant to the plaintiff. The declaration contained four special counts upon the contract, together with the common counts, for goods sold and delivered, money had and received, lent and advanced, &c.

The *first count*, stated on the 20th of June, 1828, at Petersburg, in the state of Virginia, the plaintiff bargained with the defendant to buy of him, and the defendant there and then sold to the plaintiff a large quantity of jewelry, for the price of 800 dollars, to be delivered to the plaintiff, as soon as the defendant could make out a bill thereof; the said goods to be paid for by the plaintiff in three promissory notes, for equal amounts, at six, twelve and eighteen months: and in consideration thereof, and that the plaintiff had undertaken to accept and pay for said jewelry, in the manner herein before set forth, the defendant undertook to deliver the same as aforesaid. It then averred, that a reasonable time had elapsed, that the plaintiff had always been ready and willing to accept, receive and pay for said goods, in manner aforesaid, and that the defendant had refused to deliver the same; by reason whereof, the plaintiff had lost and been

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deprived of *divers great gains and profits*, which might and otherwise would have arisen, and accrued to him from the *delivery* of said goods, &c.

The second count was similar to the first, except in the statement of damage which was as follows, viz. "By means "whereof, the said plaintiff hath been deprived of sundry great "gains and profits, which he might and otherwise would have "acquired, by *re-selling* the said jewelry, at *much higher and advanced* prices."

The third count was substantially the same with the second, stating the damage precisely in the same way.

The fourth count differed from the three preceding ones, in averring a tender of the notes, and a demand of the goods, and stating the damage to be the loss of great gains and profits, which the plaintiff would otherwise have acquired, by re-selling said goods, at higher and more advanced prices; but there was a general conclusion to these counts, (and also to the whole declaration,) stating that the plaintiff had sustained damage by the premises to the amount of 2500 dollars.

To the first four counts, the defendant interposed separate, general demurrers, and pleaded the general issue to the common counts. The plaintiff have joined in the issue of law and fact,—

*Mr. B. Clarke* and *J. Anthon*, for the defendant, presented the following points in writing, in support of the several demurrers.

I. No consideration passed between the parties, in making the contract, nor was any earnest given to bind the bargain. This objection is applicable to all the counts.

II. If the contract can be sustained on the ground of mutual promises, then, as the defendant was not bound to deliver the goods until payment was made, or in other words, as these acts were to be simultaneous, the plaintiff ought to have expressly averred a tender of the notes in payment. This objection effects the first three counts, which contain no such averment. [*Clarkson v. Carter, 3 Cowen's R. 84.*]

III. The damages in this case form the very gist of the action,

and if no damages, which the law can recognize, are stated in the declaration, it will present a case of *damnum absque injuria*, and consequently be demurrable.

The only damage stated in all the counts demurred to, consists of *conjectural profits*; these can in no case afford a legal rule of damages. Damages to be the subject of a suit, must be proximate, and not remote or depending on a contingency. This objection effects all the counts.

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*Mr. E. Curtis* for the plaintiff, *contra*, presented the following argument in writing.

The defendant's first point consists of two parts:—1. That no consideration passed between the parties; 2. that no earnest was given to bind the bargain. The answer to the first part is, that the contract is one of mutual promises, and one promise is a valid consideration for the other. The plaintiff's promise to give the notes, was a good consideration for the defendant's promise to deliver the goods. The answer to the second part is, that the paying of *earnest* is no part of the contract, but is in part performance of it; and whether a contract is made valid by being reduced to writing, or by earnest paid, will not appear by the declaration, but by the evidence in support of the declaration: The declaration will cover a contract between the parties reduced to writing. But the question of earnest does not apply to a contract made in Virginia, where they have no statute of frauds, applicable to contracts concerning personal chattels.

The defendant's second point is, that the first three counts of the declaration are bad, because, there is not an averment that the notes were *tendered*. It was formerly considered doubtful, whether the plaintiff, in declaring upon mutual promises, was, or was not, bound to aver an offer to perform on his part. [1 *Saund.* 320. n. 4. 7. *D. & E.* 125.] It is now, however, settled, not only in England, but in our own state, that an averment of a readiness to perform is sufficient. [*Arch. Pl.* 100. 1. *East.* 203. 2. *Bos.* & *Pul.* 447. 5. *J. R.* 178. 12. *J. R.* 209.] In the case cited by the defendant's counsel, from the third of Cowen's Reports, the

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1829. court merely decided, that on a sale of goods for cash, the vendee is not entitled to possession till he pays the price.

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The defendant's third point, is, that the declaration states a case of *damnum absque injuria*, since no other than conjectural profits are stated as damage. If we cannot recover, by way of damage, our conjectural profits, yet, if the declaration contains a legal cause of action, independent of the averment of conjectural profits, the court will treat that averment as surplusage, when not demurred to specially. Those averments may be rejected in each count, and yet leave a complete cause of action, because, in the fourth count the plaintiff, in conclusion, says, in reference to all the previous counts, "by means of all which premises, the said plaintiff says he is injured and hath sustained damage, to the value of twenty five hundred dollars," and, because also, in the conclusion of his declaration, the plaintiff alleges a general breach, and concludes to the "damage of the said plaintiff, of twenty five hundred dollars, and therefore the said plaintiff brings suit," &c.

The declaration, therefore, stripped of those parts which the defendant calls *averments of conjectural profits*, is complete, since it sets forth a valid contract, a breach of that contract, and a general averment of damage. But the defendant is mistaken in supposing, that we cannot recover beyond *positive damage*, or *money out of pocket*. The only case to be found, that in any degree supports the position of the defendant, is a case in 2 W. Bl. R. [10 78.] and that case, when examined with discrimination, will be found to fall short of the rule of damages contended for in this cause. The true rule is this: when the person bound to deliver, fails, without fault or fraud, the purchaser's claim is for such damage, as, at the time of the contract was foreseen, as a necessary consequence of the failure.

In Bell's Commentaries on the laws of Scotland, and the principles of mercantile jurisprudence, [1 Bell 448,] the rule of damages is thus laid down.

"The claim of the buyer, to whom delivery is refused, is two

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"fold : first, for repayment of the price, if already paid to the seller; and second, for indemnification of the loss by non-fulfilment. As to the claim for indemnification of loss, the principle is, that where the person bound to deliver, is prevented by insolvency, or other accident, from fulfilling his engagement, the buyer's claim is for such damage only, as at the time of the contract was foreseen, as a necessary consequence of the failure, to deliver the article." This principle points out, as the proper object of such a claim, the indemnification of that sort of damage which is directly connected with the subject of the contract—loss arising from the want of the article purchased, or gain, of which, by the failure to deliver it, the buyer has been deprived. Thus a dealer, who is himself under contract to deliver a quantity of corn, buys and pays for one hundred bolls, at 25s. per boll, and being, on failure to deliver, obliged to go elsewhere for it, he, in consequence of the augmentation of price, pays 50s. for the same quantity; he will be entitled to not only claim re-payment of the price which he paid, but to claim also, as a creditor for 25s. more. And, in the same way, if he buy on speculation, and can show that he might have sold the corn at 50s., he is entitled to claim re-payment of the price paid, and 25s. more as gain, of which he has been deprived."

The same principles are laid down by Pothier. [Poth. on Oblig. (Evans') 90, 91.] When the debtor cannot be charged with any fraud, and is merely in *fault*, for not performing his obligation; either because he has incautiously engaged to perform something, which it was not in his power to accomplish, or because he has afterwards improvidently disabled himself from performing his engagements, the debtor is only liable for the damages and interest which might have been contemplated at the time of the contract, for to such alone, the debtor can be considered as having intended to submit.

In general, the parties are deemed to have contemplated only the damages and interest, which the creditor might suffer from the non-performance of the obligation, in respect to the particular thing which is the object of it, and not such as may have been incidentally occasioned thereby in respect to his other affairs.

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This declaration has for a precedent, both Chitty and Wentworth. [2. *Chitty*. 105. *Wentworth* 2. vol. 189.]

*Mr. Clarke* and *Mr. Anthon* in reply. The case of *Clarkson v. Carter*, [3. *Coven's R.* 84,] establishes the principle contended for, on the part of the defendant, so entirely, as to preclude all argument.

The vendor, according to that case, when the sale is for cash, is not bound to part with his goods until he receives the cash; so, therefore, when he sells for notes, the party purchasing, has, upon the principle of that case, no right to demand the goods until he has delivered, or at least tendered the notes. The payment or tender of the money, and the delivery or tender of the notes, consequently form *essential* averments, according to the case cited. Whether this is, or is not, conformable to the English cases, is therefore a matter of no moment, and but little trouble has been bestowed upon the inquiry. The first three counts are, therefore, defective in substance, in this particular, and the general demurrer is sustained.

As to the third point, which affects all the counts, the plaintiff insists that the averment of damage in the several counts demurred to, (which he seems to admit to be bad,) may be rejected, and a complete cause of action still remain; because the fourth count concludes with these words, "*by reason of all which premises he hath sustained damage, &c.*" To this we reply, 1. That this general clause, whatever may be its value, can and does only, refer to the *fourth count*, the three preceding counts being *perfect* in themselves, concluding with a special averment of damage. 2. The "premises" referred to in this averment, are the *loss of profits* averred in the next preceding sentence, (and in the preceding counts, if it can be made to relate to them,) making this general clause, and the preceding special clause, in effect, the same; and 3d. that as to special damages, which form the very gist of the case, a general averment is *no averment*; the specific injury must be alleged. The consideration of this last position, therefore, recurs and covers the whole case.

That damage does not necessarily result from the facts set forth in the declaration, viz. "*the non-delivery of goods on a contract,*

"when the vendee has not parted with his money," is obvious, in as much as the very same state of facts may be attended with *positive gain* to the vendee.

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If the markets have advanced, he may be a loser by missing his profits, but if they have declined, he is manifestly a gainer by avoiding the loss. That the *possible profit* is not the rule of damages, seems to be admitted. That there *may* be a legitimate damage from a non-delivery, is *possible*, although it is difficult to conceive in what it can consist, profits being shut out. That *this damage*, therefore, and not the *body of facts*, forms the *gist* of the action, is clear, and it necessarily follows that it *must be averred*, *and that specially too*, to put the defendant on his defence.

The case cited by the counsel for the plaintiff, from *Sir W. Blackstone's Reports*, [*Flurea v. Thornhill*,] supports these positions. Damages were there sought for the non-delivery of an article sold. De Grey, Chief Justice, commenting on the rule of damages, with reference to *profit*, observes, "I do not think the purchaser can be "entitled to any damages, for the fancied goodness of the bargain "which he supposes he has lost;" and Blackstone, Justice, commenting on the rule of damages, with reference to *the fluctuation of price* in the market, expressly says, that this is immaterial, inasmuch as "the plaintiff had a chance of gaining as well as of "losing by the fluctuation of the price;" and to this it may be added, that if he sustained a loss by the rising of the article in the market, it was his own fault, as he, having his money in his possession, might have bought other articles of the same kind, on the very day the contract was broken.

From all this it results, that the facts, standing by themselves, necessarily manifest a case of *damnum absque injuria*, and that to make such a state of facts actionable, *a special, substantive and legal damage must be averred*, and the defendant, before he goes to trial, must have the opportunity, on the face of the pleadings, of bringing the alleged damage to a legal test. Under the present form of the counts, a jury might give the profits by way of damage, and it might be exceedingly difficult for the court to redress the grievance. The absence of a proper averment, in this respect,

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being, therefore, clearly matter of substance, is a ground of general demurrer.

The Scotch law cited by the counsel for the plaintiff, is altogether too vague to be applied to any valuable practical purpose, and so far as the Scotch cases have applied it, is manifestly in collision with the sound rules of the English law.

What, in the case of a sale of goods, is the damage "*foreseen as the necessary consequence of a failure to deliver the article?*" If we interpret this phrase by the cases cited, it means the loss of profit from a rise in the market. What would have been the Scotch rule, if in the cases cited by the plaintiff's counsel, the articles had *declined* in the market? Upon their own principles, the facts, without the averment of a special damage, would have shown a case of *damnum absque injuria*.

Had the plaintiff in this case been constrained to purchase the articles, upon our default, at a higher price, this might have furnished a legitimate ground of damage, which, however, would have required a special averment for the reasons above given.

The Scotch law, therefore, which has been referred to, affords no aid to the plaintiff whatever, and merely demonstrates the futility of referring to the laws of a comparatively uncommercial country, for rules to aid the practical operations of a commercial one.

As to the arguments derived from the *precedents*, ancient and established forms, which have passed the ordeal of legal tribunals, are undoubtedly of the highest authority. Those referred to in this case have no authority attached to them, not even the name of an experienced pleader. And the counsel for the plaintiff manifestly disapproves of them, being constrained to resort to the rule of rejection and surplusage, to make them at all tenable.

On every ground, therefore, we trust the demurrs are sustained; 1st. for the want of a proper averment of tender; and 2dly. for the want of a proper averment of damage, to give an actionable character to the facts.

OAKLEY, J. This case comes before us on separate demurrs to the first four counts.

The defendant objects, in the first place, that no consideration for the undertaking on his part is alleged. The answer to this is, that the counts demurred to are upon *mutual promises*, and that the promise of the plaintiff to accept the goods and pay for them, is the consideration of the defendant's promise to deliver them. This is no doubt a sufficient averment of a consideration.

The defendant objects, in the second place, that the three first counts do not aver a tender of the notes, by which payment for the goods was to be made. The averment is, that the plaintiff had "always been ready and willing to accept and receive the goods, &c., and to pay for the same at the price and in the manner," &c. I am of opinion that this averment is sufficient. The formal tender of the notes, which the plaintiff was not bound to part with, until the goods were delivered, could not be necessary.

In *Porter v. Rose*, [12 J. R. 212,] the court say that the result of all the modern cases on the subject is, that "where two acts are to be done at the same time, as when one agrees to sell and deliver, and the other agrees to receive and pay," an averment, by the purchaser of a *readiness and willingness to pay*, is necessary, and that such an averment must be proved at the trial. In *West v. Emmons*, [5 J. R. 179,] the principle is laid down, that where either party has the power to perform, without any act being previously necessary to be done by the other, the party bringing the action must aver performance, or a tender and refusal, which are equivalent to a performance. The action in that case, was upon a covenant, by which the defendant agreed to convey certain premises to the plaintiff, and the plaintiff covenanted to mortgage them to the defendant for a part of the purchase money, and the objection was, that the plaintiff ought to have averred a formal tender of the mortgage, and that the averment that he had always been ready and willing to execute the mortgage was insufficient. The court held otherwise. They say it would have been an idle ceremony to tender a mortgage, actually executed, when the defendant refused to deliver the deed, and that it would invert the order in which the covenant was finally to be executed. So here, the actual making and tendering of the notes, would have been equally idle, when the defendant refused to deliver the goods.

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The payment, in the natural order of things, was to follow the delivery, and although it was to be simultaneous, it was not to be completed until the goods were actually received.

The doctrine of this case is in accordance with that laid down in *Rawson v. Johnson*, [1 East. 203,] and in *Waterhouse v. Skinner*, [2 Bos. and Pul. 447.] In these cases, the action was on an agreement to sell and deliver personal chattels, at a stipulated price, by a given day. The plaintiff averred in his declaration, (as in the case now before us,) that he was ready and willing to pay for the goods, and to receive and accept the same, but that the defendant refused to deliver, &c. The averment was held sufficient, though no actual tender of the money was shown. It was said in those cases, that, under such an averment, the plaintiff must prove that he had the money ready to be paid if the property had been delivered. So in the present case, if the payment for the goods was to have been made in the notes of third persons, it would be incumbent on the plaintiff to prove that he was possessed of such notes ready to be given to the defendant. But the payment being to be made in the plaintiff's own notes, which he could execute at any moment, it seems to me that a general averment, that he was ready and willing to execute and deliver his own notes, is all that the good sense of the contract requires; and that it was not necessary for him to show that he had actually tendered his notes, formally drawn and executed.

It is objected, in the third place, by the defendant, that in all the four counts, the damage resulting from the breach assigned, is stated to consist of a loss of the *profits* of the purchase, and that the loss of such profits does not afford any ground of action. In answer to this, it is sufficient to say, that as each count contains a proper breach of the agreement, the general averment of damage, in the conclusion of the declaration, applies to all, and the special averment of damage, in each count, may be rejected as *surplusage*:

*Judgment for the plaintiff, with leave, &c.*

[E. Curtis, Atty for the plff. B. Clark, Atty for the deft.]

*Note.—See Bank of Col. v. Hagner, [1 Pet. R. 466.]*

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WILLIAM E. ROSS versus WILLIAM W. DRINKER.

The plaintiff employed the defendant to procure consignments for him, and to act as his agent in certain mercantile business, to be carried on in the name of the plaintiff. The defendant, as a compensation for his services, was to receive one half of the profits of the business; but he had no authority to contract debts in the name of the plaintiff, nor was he to be liable to third persons for any responsibilities created for the concern. No profits were ever realized, but on the contrary, losses ensued, and the plaintiff brought an action of *assumpsit* against the defendant for money had and received to his use, as appeared by the books, which the defendant had kept. HELD, that the foregoing facts did not constitute such a partnership between the parties, as would bar the action at law; and the plaintiff having recovered a verdict against the defendant, for the balance of his account, the court refused to set it aside.

THE question in this case was, whether the defendant was a partner with the plaintiff or not. It was an action of *indebitatus assumpsit*, for money had and received, money lent and advanced, &c.; and the defendant, for the purpose of defeating a recovery, in an action at law, set up a partnership with the plaintiff, as his defence.

At the trial of the cause, it appeared that the defendant had been in the employment of the plaintiff, under the agreement hereinafter mentioned, and that, from entries made in the books of the plaintiff, by the defendant himself, (who had kept them,) a balance of 4900 dollars and upwards, was due from the latter to the former. It appeared also, that after the commencement of this suit, the defendant filed a bill in chancery against the plaintiff; but no injunction or stay of proceedings, was ever issued against the action at law.

The defendant, for the purpose of proving the partnership, introduced the plaintiff's answer to his bill in chancery, from which it appeared, that the plaintiff being about to establish himself in the city of New-York, as a merchant, but being inexperienced in mercantile affairs, at the solicitation of the defendant, received him into his employment, as an agent or assistant, agreeing at the same time, to give him *one half of the profits of his business*, as a compensation for his services. The defendant on his part, was

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to procure consignments for the plaintiff, keep his books, and give him advice as to the manner in which the business should be conducted ; but he was to have no power of signing the plaintiff's name, for the purpose of creating responsibilities against him, nor was he to be liable to third persons for the debts of the plaintiff; and the benefits to be received by him from the connexion, were to be restricted to his agency, and the profits aforesaid.

The defendant, for the purpose of creating a confidence in his capacity, on the part of the plaintiff, had told him, that if any loss should follow as a consequence of his mismanagement that he would bear one half of it ; but there was no agreement to bind him to that effect ; and the plaintiff, knowing the defendant to be irresponsible, did not consider the promise of any consequence one way or the other.

The complainant, by his answer, expressly denied that there was a partnership between himself and the defendant, although he admitted the foregoing facts ; and he stated that he employed the defendant, upon the terms aforesaid, as his assistant and book-keeper. It was, however, further agreed, that at a future time, the defendant should become the partner of the plaintiff, whenever he could relieve himself from certain mercantile embarrassments, which were hanging over him ; but that agreement, the plaintiff, by his answer declared, had never been carried into effect.

Under the agreement aforesaid, (which was not reduced to writing,) the plaintiff hired a store in his own name, advanced the capital necessary for the carrying on of the business, the defendant furnishing nothing but his personal services ; and the business was transacted in the name of the plaintiff alone. In the course of it, however, whenever goods were purchased, the defendant was in the habit of lending to the plaintiff his notes, to be endorsed by the latter, and given in payment for such goods ; but this arrangement was made as a favor to the plaintiff, with an understanding that he should always take up said notes when due ; and he did so, without putting the defendant to any inconvenience.

There were many transactions between the parties, and vari-

ous interchanges of accommodations and favors; some of which would countenance the idea of a partnership, and others would not; and the defendant produced letters from the plaintiff, containing expressions which supported, in some degree, the defence upon which he relied.

The plaintiff, on his part, produced the letters of the defendant, to various correspondents, wherein he represented himself as the mere agent of the plaintiff, denying all connexion with him as a partner; and in various conversations with witnesses, the defendant had also denied the existence of a partnership between himself and the plaintiff.

It appeared, from the plaintiff's answer to the defendant's bill, that there never had been any *profits* in the business, but on the contrary, that it had resulted in loss, and that the connexion had been dissolved by the plaintiff himself, without consulting the defendant in any way.

After the whole testimony had been closed, the counsel for the defendant insisted, that the agreement disclosed in the plaintiff's answer to his bill in chancery, and the facts of the case, showed a partnership between them, and that there could be no recovery against the defendant at law: the plaintiff's only remedy being in a Court of Equity.

The Judge charged the jury, that the agreement disclosed by the answer did not, *per se*, in his judgment, create or constitute a partnership, between the plaintiff and the defendant, so as to defeat the action at law, under the circumstances of this case; especially as it appeared from the answer to the defendant's bill, that the business had been carried on at a loss, instead of a profit. That the other evidence in the case, was to be passed upon by them; and if they should be of opinion that it made out a partnership, and showed an agreement to that effect, then, that the plaintiff could not recover at law. That the books of the plaintiff, which were kept by the defendant, coupled with the answer in chancery, would enable the jury to fix, with reasonable precision, the balance due from the defendant to the plaintiff; but as there might be some inaccuracy in the items, he recommended the jury, *with the consent of the parties*, to find a verdict in favor of the plaintiff,

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if the fact of partnership was not in their opinion established, for an amount sufficient to cover his whole demand, subject to a liquidation of the accounts by referees. The defendant having excepted to the charge, the jury returned a verdict in favor of the plaintiff for 4000 dollars.

*Mr. E. N. Mead* and *Mr. Geo. Briekershoef*, in behalf of the defendant, now moved for a new trial. They contended, that the agreement, under which the parties were engaged in business, as proved by the plaintiff's answer in chancery, and the other testimony produced at the trial, constituted them co-partners, or showed such a connexion between them, in the nature of a co-partnership, as to bar the plaintiff from maintaining an action at law against the defendant. A communion of profit and loss, (they said,) constituted a partnership as to all the world; and where the amount of compensation, to be received by one person, for services performed for another, is indefinite or uncertain, and made to depend upon the profits of the business in which the apparent agent is engaged, that constitutes a partnership between the parties. [*Dob. v. Halsey*, 16 J. R. 34. *Murphy v. Whitney*, 10 J. R. 236.]

As to third persons, there was no doubt that Drinkar had made himself liable for the debts of Ross, by agreeing to receive one half of the profits of the business, carried on in the name of the plaintiff. These profits constituted the fund among other things, from which the creditors were to be paid; and by consenting to take a portion of that fund for his services, the defendant made himself liable for the debts of the concern. This is a well settled principle of the law of partnership. [1 Camp. R. 329.]

The plaintiff, it is true, has denied in his answer, the existence of a partnership; but that is a conclusion of law which he cannot deny; for if he admits an agreement, which in judgment of law constitutes a partnership, his denial cannot affect the agreement, or alter the conclusion which the court must draw from it. The agreement is disclosed by the answer, and the court must say whether that constitutes a partnership or not.

In this case, the business carried on, in the name of Ross, was for the joint benefit of himself and Drinker. One party brought money into the concern; the other, knowledge of business, talents, industry and personal services. Those services formed a fair equivalent for the capital, and the profits to be derived from the plaintiff's capital, used by the defendant, for the common benefit of both, were to be equally divided between the parties. How can we escape the conclusion, then, that the transactions between the parties, were partnership transactions, and that a Court of Chancery is the only tribunal which can do justice between them?

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The very claims of the plaintiff show a partnership. The action is for money had and received. The plaintiff proves, that the defendant received the money, and the latter asserts, and before a proper tribunal, would have an opportunity of proving, that the amount with which he stands charged, constitutes a part of the losses of the business. The plaintiff in his answer, absolves the defendant from his liability for losses, and yet, by suing him for the capital put into his hands, he effectually charges him with losses, which are the foundation of the present demand. In the books of the plaintiff, the defendant is charged with losses; and how can an equitable balance be struck in a court of law? Chancery is the proper tribunal for the liquidation of partnership accounts, and thither the plaintiff should go for relief, if he has any just cause of complaint. There the whole transaction can be examined; the master can take the books into his possession; the parties can appear and make explanations, and equal justice can be done to both.

But we rely upon the proposition with which we set out; namely, that the agreement disclosed by the answer in chancery, in judgment of law constitutes a partnership, and that the plaintiff has not, therefore, a right to maintain this action. If this position be true, there must not only be a new trial, but the court will, by their opinion, inform the plaintiff that he cannot support an action at law at all, after the disclosures made by his answer. Before assumpsit can be maintained, a balance must be struck. If any thing remains unsettled, a court of law cannot interfere between the parties, but they must be left to the only tribunal which can

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1890. do equal justice between them. [*Theater v. Fowler*, 1 *Hal's R.*  
180. *Rogers v. Rogers*, *Ib.* 391. 394.]

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*Mr. J. Greenwood* and *Mr. Foote*, contra, for the plaintiff, contended, that there was no partnership between the plaintiff and the defendant, and that there could not, therefore, be any objection to the action. That it was apparent, from the answer in chancery, upon which the defendant relied, that he was a mere agent, or clerk in the employment of the plaintiff, whose compensation was made to depend upon a contingency. He had no power to use the plaintiff's name; he was not authorized to contract debts; he had no discretion except as a mere agent. He, himself, had repeatedly denied the existence of the partnership, and could now be permitted to shield himself from a just responsibility, by holding up the forms of the law. They denied that the defendant was a partner at all in any sense of the term.

The principle, they said, upon which a person is made liable as a partner, to third persons, (except in cases of plain agreements,) is, that he withdraws a part of the fund from the creditors. In this case, the defendant could not withdraw the fund, for he had no right to touch it, until all the debts of the concern were paid. He was to be compensated by profits, which means, that he was to partake of what might remain, after the creditors were all paid, and the plaintiff's capital had been returned to him. But in this case there were no profits, and the defendant had not a legal right to touch the fund. Instead of conducting himself like an honest agent, he receives funds to be applied in the business of his employer, appropriates them to his own use, and then leaves the plaintiff to pay the debts, and bear all the losses. He cannot now set up a partnership as his defence, but is liable, in this action, for the money which he received to the plaintiff's use. [*Waugh v. Carver*, 2 *H. Bla.* 235. 2 *W. Bla.* 998. 4 *East.* 144. 10 *J. R.* 226. 1. *Camp.* 329. 4 *Esp. R.* 182. 3 *Kent's Com.* 11.]

If the parties were not partners, as to third persons, *a fortiori*, they were not partners *inter se*. To constitute a partnership between two individuals, there must be an agreement between

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them as to profit and loss. This agreement, it is true, need not always be expressly proved, for it may be inferred from the acts of the parties. In this case, there is no express agreement proved, and the Judge submitted all the acts of the parties, from which an agreement might be inferred, to the jury; and the jury found against the fact of a partnership. Unless, therefore, the court shall be of opinion, that the plaintiff's answer in chancery discloses an *agreement*, which *per se* constitutes a partnership, there cannot be a new trial. The answer negatives the idea of a partnership; it denies it, and shows no facts from which it may be inferred, as a conclusion of law. The defendant was a mere agent, who might have been dismissed at any moment. A partnership is usually for some definite period; but here, nothing was said as to time. This strengthens the position we take. Partnership, as between the parties, is a *contract*. The *plaintiff* denies any such agreement, and the *defendant* denies it. In the absence of proof, is the court to infer a contract which both parties repudiate? As to third persons, a man may be made liable even against his will; for if he permit his credit to be held out to the world, for the benefit of another, he may be compelled to suffer the consequences. But, as between the parties themselves, there must be an agreement, and here none is shown by the party who relies upon it. [4 *Barn. & Ald.* 663. The counsel for the plaintiff also commented upon the case of *Dobbs v. Halsey*, at length, to show that the principles of that case did not interfere with this. As to the charge of the Judge, in relation to referring the cause, for the purpose of ascertaining the exact balance due to the plaintiff, they cited, *Dunlap's Practice*, 543, and the statute as to references.]

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The COURT refused to grant a new trial, being of opinion that the agreement, disclosed by the plaintiff's answer to the defendant's bill, did not constitute a case of partnership. And, as all the other testimony was left to the jury, and they found against the partnership, the court were of opinion, that their verdict ought not to be disturbed, being supported by the evidence.

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*New trial denied, and the verdict to stand subject to a liquidation  
of the accounts by referees.*

[J. Greenwood, Atty for the plff. C. N. Mead, Atty for the def't.]

*Note.—This cause was originally brought before the court, for argument, at its preceding June Term. It then appeared, that the defendant had filed a bill in chancery, against the plaintiff, embracing the same subjects of controversy, which were presented by the action at law; but the defendant had obtained no injunction to restrain the proceedings at law, nor had he any stay of proceedings from a Judge. The court were of opinion, that it was irregular for a party to proceed in this court, when it was apparent that another tribunal, whose jurisdiction could not be questioned in cases of partnership, had the same subject before them. The court, therefore, ordered the argument to be postponed, in order to give the defendant an opportunity to restrain the plaintiff from proceeding at law, by a proper application to Chancery. The defendant having neglected to do this, the cause was brought on at this term, and disposed of as appears by the case.*

EDWARD W. DUNHAM and ROMEO WADSWORTH

*versus*

THE AMERICAN INSURANCE COMPANY OF NEW-YORK.

Notwithstanding the clause in a policy of insurance, whereby the insured warrant "the property 'free from any charge, damage or loss, which may arise in consequence of a seizure, or detention for, or on account of any illicit, or prohibited trade,'" the underwriters are liable for the consequences of an illicit traffic, baratrously carried on by the master and crew, at a foreign port, without the knowledge or privity of the owners, whereby the property insured is seized, and becomes forfeited by the laws of the country.

THIS was an action upon three several policies of insurance, underwritten by the defendants, one upon the vessel, another upon the cargo, and the other upon the freight of the schooner Gertrude, to recover the amount of expenses incurred in consequence of the seizure and detention of the vessel and cargo at Puerto Ca-

bello, in the Republic of Colombia, through the barratry of the master and mariners. The defendants, by their policies, stipulate to take upon themselves, the perils of the seas, arrests and restraints, and detainments of all kings, princes or people, "barra-  
"try of the master and mariners" &c.; and the assured warrant the property free from any charge, damage or loss, which may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade, or any trade in articles contraband of war.

A verdict was taken by consent, for the sum of eighteen hundred and seventy three dollars and two cents, being the amount of the plaintiff's demand, subject to the opinion of the court on the following case.

The plaintiffs were the owners of the vessel, and that part of the cargo insured; but had taken other goods on board, on freight: the whole cargo, however, consisting of lawful goods, admissible in the ports of Colombia, laden at New-York, and shipped for the purpose of being landed and sold at Puerto Cabello. The vessel sailed from New-York, bound to Puerto Cabello, with her cargo, on or about the ninth of August, 1827, and on the 28th day of the same month, arrived at Puerto Cabello, under the command of James Anthony, the master. Immediately on her arrival, the captain or collector of the port, and the custom house officers, came on board, and demanded of the master the manifest of the cargo, which was given; they then proceeded to search the forecastle of the vessel, where they found, secreted, two bags, containing 75 lbs. of tobacco, and one bag and one box containing 37 lbs. of cigars, which were not contained in the manifest, and had been clandestinely taken on board by the cook, one of the crew of the vessel, on his own account, without the knowledge or consent of the owners or supercargo, and secreted, with a view of being smuggled into Puerto Cabello. The collector and officers then proceeded to search the cabin, where they also found, secreted, four boxes of combs, not inserted in the manifest; and they then opened the captain's chest, where they found five boxes and three bundles of Havannah cigars, three bundles of snuff, six boxes of mustard, twelve pair of pantaloons, one hat, eleven pounds of leaf tobacco,

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thirty boxes of paste blacking, eighteen pairs of ear-rings, twelve pen-knives, four boxes of raisins, twelve bottles of essences, and sundry other articles of merchandise, which belonged to the captain, and had been clandestinely taken on board by him, on his own account, without the knowledge or consent of the owners or supercargo, for the purpose of being smuggled into Puerto Cabello for sale. Of the aforesaid articles, the importation of tobacco and cigars, was, at the time, *absolutely prohibited*, by the laws of Colombia; and the other articles were by the same laws, required to be entered on the manifest, and were subject to the payment of duties; but none of them were so entered on the manifest. Upon making this discovery, the vessel and cargo were both seized by the public authorities of Puerto Cabello, as forfeited to the government of Colombia, for violating the laws, prohibiting, under the penalty of forfeiture and confiscation, the importation of tobacco and cigars; and also for the intended fraud on the revenue, by reason of the other articles not being included in the manifest, and an armed force was put on board the vessel, and the captain and cook were committed to prison. Proceedings against the vessel and cargo were instituted in the proper tribunals of Colombia, but, through the exertions of the consignee there, the vessel and cargo were finally given up at a heavy expense incurred.

It was admitted that, by the laws of Colombia, the importation of tobacco and cigars, into Colombia, at the time, was prohibited under the penalty of confiscation of the vessel and all the cargo on board, and the vessel and cargo were also liable to seizure and confiscation, for the omission to insert in the manifest, the other articles intended to be smuggled, by the master, into Puerto Cabello; and the present action was brought to recover the amount of expenses paid by the plaintiffs in effecting the liberation of the vessel and cargo.

It was also admitted, that the conduct of the master and cook, was barratrous, and the point reserved was, whether the defendants were protected from liability by reason of the clause in their policies, exempting them from responsibility in cases of illicit and prohibited trade. If the court should be of opinion, in favor of the plaintiffs, the verdict was to stand, otherwise a nonsuit was to be

entered. Either party had liberty to turn the case into a bill of exceptions or special verdict.

The case was submitted to the court upon the following point made by the plaintiffs, viz :—that the underwriters are responsible for a loss by illicit trade, barratrously carried on by the master, and are not protected by the clause in the policy against illicit trade. [ *Suckley v. Delafield, 2 Caines' R. 222.* ]

*The Court gave judgment for the plaintiffs, on the authority of the case of Suckley v. Delafield, as being exactly in point.*

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*Judgment for the plaintiffs.*

[W. Sloman, Atty for the plff. B. Robinson, Atty for the deft.]

WILLIAM HANKINS, an infant, by SARAH M. HANKINS, his  
guardian,

*versus*

ELISHA KINGSLAND.

An officer who has levied an execution upon personal property, is not deprived of his special interest therein, by taking the bond or receipt of a third person, stipulating for its production on the day of sale; and, if forcible possession be taken of the goods by a wrong-doer, the officer may maintain trover for them, founded upon his special interest.

If upon the return to a *certiorari*, the plaintiff in error rely upon infancy, disclosed by the record, as a defence, it must be specially assigned as *error in fact*, that the defendant in error may take issue upon it.

CERTIORARI to the Assistant Justice of the 12th Ward.

The plaintiff in error, in this case, had entered into partnership with one Fisher, with whom he carried on the business of harness-making,—but afterwards having dissolved the partnership, he

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sold out his interest in the joint stock to Fisher, and surrendered the possession to him. The defendant in error, (who was an officer,) having an execution against Fisher, levied upon the property which had formerly belonged to the partners, and one John Beatty gave him a bond or receipt for it, whereby he stipulated that the goods levied on should be forthcoming at the day of sale. The plaintiff in error not having been paid for his property by Fisher, repossessed himself of a part of it, after it had been levied on by Kingsland; and the latter, thereupon, brought an action of *trotter* against Hankins, before Mr. Flanagan, the Assistant Justice of the 12th Ward.

At the trial of the cause before the Justice, upon the general issue, the defendant, for the purpose of defeating the action, offered to prove the right of property in the goods levied on, to be in Beatty. This evidence being objected to, was rejected by the Justice, and the defendant ~~excepted~~ to his opinion. The defendant then proved that he was but 18 years old at the time of the trial, and insisted that no recovery could be had against him, upon the ground, that as he was an infant, the sale by him to Fisher was void, and that he had, therefore, a right to reposess himself of the goods sold. He also insisted that he could not be proceeded against in the action, as no guardian had been appointed for him, by whom he could appear and defend. It appeared, also, by the testimony of one of the witnesses, that Fisher had refused to pay Hankins the whole amount due to him, upon the ground that he was "under age."

The Justice gave judgment in favor of the plaintiff for fifty dollars, and the defendant then took out a *certiorari*.

*Mr. J. R. Whiting*, for the plaintiff in error, now insisted that the judgment below was erroneous, for the reasons assigned before the Justice. That an infant ~~must~~ appear and defend by his guardian, or next friend, and that the proceedings in this case were irregular. [2 *Sound.* 212. *Mockey v. Grey*, 2 *John. R.* 192. *Alderman v. Tirrell*, 8 *Ib.* 326. *Dewitt v. Post*, 11 *Ib.* 460. *Arnold, Duncan, et. al. v. Sanford*, 14 *Ib.* 417.]

That the sale by Hankins to Fisher was voidable, if not void, on

the ground of the infancy of the former. He had a right, therefore, to rescind the contract of sale, and repossess himself of his property.

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*Mr. J. D. Craig, contra,* insisted that if the plaintiff in error had intended to rely upon infancy as a defence, he ought specially to have assigned, as *error in fact*, that he was an infant, and that he had appeared in person, and not by guardian, that the defendant in error might have put the fact of infancy in issue; whereas, he has presented a general assignment of errors in law merely. [9 *J. R.* 159.]

II. The *fact*, as to the infancy, was submitted to the Justice upon the general issue before him, and decided against the plaintiff in error. If he was not an infant, no guardian could be assigned; and if, upon the return to the *certiorari*, the plaintiff in error had specially assigned for error his infancy, such an assignment being *against the record*, would have been unavailing. [3 *J. R.* 437.]

III. The receipt given by Beatty did not divest the officer of his special property in the goods, and the Justice very properly excluded the evidence offered as to that point.

*Mr. Whiting in reply.*

I. The defendant in error, if he intended to rely upon the full age of Hankins, should have pleaded in abatement to the assignment of errors, or moved to set it aside. By permitting the court to assign him a guardian, to prosecute his writ of error as an infant, the defendant thereby admits the fact of the plaintiff's infancy.

II. The Justice did not find that the defendant below was of full age. "After taking three days for deliberation and advice, he gave judgment for the plaintiff against the defendant." He did not say, under his oath of office, that Hankins was of age.

III. The objection, that the infancy of Hankins should have

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been assigned as error in fact, is not well taken. If it did not appear by the return, and thus on the face of the record, it would have been necessary to have assigned it. But it appears to be a well settled principle, that if the error is apparent upon the return, it may be taken advantage of upon a general assignment of errors. [Bacon's Abridg. Tit. Error, K. 2, page 487, note A.] In *Waling v. Toll*, [9 John. R. 141,] it appeared upon the return of the Justice, and the court reversed the judgment. In *Bliss v. Rice*, the infancy of the defendant did not appear, it was therefore necessary specially to assign it as error in fact. In *Ingersoll v. Wilson*, [3 John. R. 437,] the defendant pleaded infancy, and issue was joined on that fact. In that case, the Justice, first from inspection, decided him to be of full age, and therefore refused to assign him a guardian. The question was then submitted to a jury, who also expressly found that plea against him. The court, therefore, very properly refused to permit the error to be assigned, because it was against the record.

*Per Curiam.* Upon the trial of this cause, the defendant below set up the right of *Beatty* to the property in question, as a defence to the action. He, it appears, had given a bond to the officer, who levied the execution, that the goods should be forthcoming at the day of sale; and they were left on the premises, where the levy was made. This did not divest the special property of the officer, nor deprive him of the right of immediate possession, and the action of trover could be maintained by him. There was, therefore, no error, in this respect, in the court below.

But the infancy of the original defendant, is now alleged as a ground for reversing the judgment. This is error in fact, and it is well settled, that it must be specially assigned, that the defendant in error may take issue upon it. Although the fact of infancy was given in evidence in the court below, it could not have been as a defence to the action, as it constituted none in trover. The Justice cannot be considered, therefore, as deciding against the fact of infancy, upon the evidence; or if he is, his decision is clearly against the proof. The special assignment of infancy, therefore, as error, would not be against the record; and upon a

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joinder in error, upon such an assignment, the fact would be tried in the usual manner.

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Upon the general assignment of error in law, the defendant in error would be entitled to judgment. But the plaintiff may withdraw it, on payment of costs, for the purpose of assigning error in fact, specially.

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[J. D. Whiting, Atty for the plff. S. D. Craig, Atty for the deft.]

MICHAEL D. VREELAND versus SIMEON HYDE.

The defendant endorsed a promissory note, payable on demand, made to secure the payment of a sum of money loaned to one of the makers, by the plaintiff. The note was not made for commercial purposes, nor was it ever negotiated, and the holder resided out of the state of New-York. At the end of 19 months from its date, demand of payment was made, which being refused, notice was given to the endorser, who claimed to be discharged by the laches of the holder.

It is, that the rule requiring promissory notes, payable on demand, to be presented within a "reasonable time" was applicable chiefly to those which are made for commercial purposes. That the present was to be likened to a case of guaranty or suretyship, and that the defendant was liable on his endorsement.

THIS was an action of *assumpsit*, brought by the endorsee against the defendant, as endorser of a promissory note of the following tenor.

New-York, June 18, 1827.

On demand, we promise to pay to the order of Simeon Hyde, eight hundred dollars, for value received, with interest from date, without default or defalcation.

HYDE & BANTA.

Witness, JOHN V. BANTA.

The note was endorsed by the defendant, and the following memorandum was entered upon the back of it. "Paid, June 18, 1828, one year's interest on this note, which is 48 dollars."

At the trial of the cause, the subscribing witness, being called by the plaintiff, testified, that he had been a clerk in the employ-

*Oct. Term, 1829.* *ment of Hyde and Banta; that the defendant was their "confidential endorser," receiving the same favor from them in return.*

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*That the plaintiff was a farmer by occupation, an old man, between 70 and 80 years of age, residing at a place called "The English Neighborhood," in the state of New-Jersey, about twelve miles from New-York. That the plaintiff loaned to Banta, (one of the makers,) the sum of 800 dollars, on the 8th of June, 1828, and received the aforesaid note, endorsed by the defendant, as security for the repayment of the loan.*

The interest on the note was paid at the end of one year from its date, but it did not appear that any demand of payment was made of the makers, until the 23d of March, 1829, and notice was given to the endorser the next day. At the date of the note, Eleazer Hyde, one of the makers, was dead, and his house had become insolvent, having made an assignment of their property to John E. Hyde, the defendant, and one W. Cox, for the benefit of their creditors; and it was stipulated in a schedule of said assignment, that if the defendant was liable on his endorsement of said note, that, then, the amount should be refunded to him out of the proceeds of the assignment.

Upon this state of facts, the defendant contended that he was not liable, being discharged from his endorsement by the laches of the holder, in not making demand and giving due notice. The presiding Judge (Hoffman) remarked, that the points presented were chiefly questions of law, and by his recommendation, a verdict was taken for the plaintiff, subject to the opinion of the court upon a case, either party having liberty to turn the same into a bill of exceptions.

The cause was now argued by Mr. S. B. Romaine, for the plaintiff, and Mr. J. A. Foot, for the defendant.

[*Mr. Romaine cited Chitty on bills, 197. 2 Caines' R. 369. 4 J. R. 224. 13 Mass. R. 131. 1 Term R. 167. 1 Cowen's R. 397. 13 East's R. 187. Mr. Foote cited the same case from Cowen and Chitty on Bills, 269.*]

*Per Curiam.* This was an action against the defendant, as endorser of a promissory note, dated the 18th day of June, 1827, payable

on demand, with interest. The defendant resided in New-York, and the plaintiff in the state of New-Jersey, about 12 miles from the city. The demand of payment, of the makers, was made on the 23d of March, 1829, and notice given to the defendant, as endorser, on the next day. The question is, whether the defendant was discharged by the delay in demanding payment.

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It is settled in our courts, that a note, payable on demand, must be presented for payment within a reasonable time, and notice given to the endorser, and that when the facts are ascertained, what is a reasonable time, is a question of law. [Sice v. Cunningham, 1 Cowen 408. Furman v. Haskin, 2 Caines' R. 369.] Every case must, in some measure, depend on its own circumstances. In the present case, it appears that the note was given for a loan of money, and upon interest, and that the interest was paid and endorsed on the note at the end of one year. Although there is no explicit evidence to show that the defendant knew the purpose for which the note was made, or how it was used by one of the makers, for whose accommodation it was endorsed; yet, the circumstances of the case are sufficient to justify the belief that the defendant was apprized of the plaintiff's possession of the note; and it evidently was not made for the ordinary purposes of mercantile negotiation. This is apparent from the phraseology of the note itself, and the caution with which it is worded. It is payable on demand, it is true, but it bears interest, and is to be paid by the makers without "*default*." This is sufficient to show that the endorsement of the defendant, was obtained under no ordinary circumstances, and that the makers had assured him, that he should come to no harm by his act of endorsing. The note itself bears evidence upon its face, that it was given to secure the re-payment of a loan, and that it was not to be demanded at the usual time, and that the endorser was considered in the light of a surety or guarantee.

The rule, requiring a presentment within a *reasonable* time, was intended for, and is applicable to negotiable instruments *made for commercial purposes only*. It was not intended for cases of suretyship, or notes of a like description, and the present one is, evidently excluded from the rule, by the peculiar circumstances

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attending it. Here the holder was an old man, not connected with business, residing at some distance from the city. The defendant knew these circumstances, and cannot claim any peculiar indulgence from a consideration of the facts. As each case is governed in some degree, by the circumstances attending it, in this, there must be judgment for the plaintiff.

*Judgment for the plaintiff.*

S. B. Romaine, Atty for the plif. A. Dey, Atty for the deft.

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CHARLES BELDEN and GEORGE BELDEN

versus

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ROWLAND DAVIES and JOHN M. DAVIES.

The only fraud which can be pleaded, at law, to avoid a deed, is fraud in its execution; such as a fraudulent reading of it, or the substitution of one instrument for another, or the obtaining, by some device, such an instrument as the party did not intend to give.

To an action of *assumpsit*, to recover the balance of an account, the defendants pleaded a *release*, under the seal of the plaintiffs. The plaintiffs replied, that the release was obtained from them, by the fraud and covin of the defendants,—on which issue was joined. At the trial, the plaintiffs, to support this issue, offered to show fraud, on the part of the defendants, in the consideration on which the release was founded. The defendants contended, that the proof ought to be confined to fraud, in the execution of it only, and that if such fraud was not shown, the release was a flat bar at law. HELD, that the position of the defendants' counsel, was fully supported by the decisions of our own courts.

The plaintiffs, to rebut the evidence of a witness, introduced by the defendants, offered a bill in chancery, filed by him, which contained allegations contradictory to his testimony at the trial. The witness stated, that the bill had been filed by his counsel, and that he had never read it, although he believed that his counsel told him what he intended to insert in it; but the bill was neither signed nor sworn to by the witness. HELD, that the evidence thus offered was not admissible.

The Judge, at the trial of the cause, without the consent of the defendants, and notwithstanding objections interposed by them, directed the jury, if they found for the plaintiffs, to find a *nominal sum*, sufficient to cover their demand, subject to a reference, to liquidate the accounts and ascertain the balance. HELD, that the Judge had no power, without the consent of parties, to direct such a verdict, and that it must be set aside for irregularity.

*Assumpsit*, to recover of the defendants the balance of an account. The declaration contained the common counts for goods sold and delivered, money lent, money had and received, &c., together with the usual count upon an account stated.

The defendants pleaded, 1. The general issue. 2. Payment. 3. A release under the hands and seals of the plaintiffs, bearing date the 21st day of April, 1827, whereby the defendants were

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released and discharged from all claims and demands of the plaintiffs, and from all causes of action, in the fullest and most ample manner.

The plaintiffs answered the second plea, in the usual manner, and took issue upon it. In reply to the *third*, they set forth, that the release therein mentioned, "was had and obtained *by the fraud and covin of the defendants,*" and this they were ready to verify. The defendants rejoined, that "the said *deed of release was had and obtained fairly*, and not by fraud and covin;" and of this they put themselves upon the country.

The cause was tried before Mr. Justice Hoffman; and at the trial, the counsel for the plaintiffs, upon opening their cause to the jury, stated it to be their intention, "to show fraud in the *consideration of the release.*" The defendants' counsel objected to this course, insisting, that, under the issue joined, fraud in the *execution* of the instrument was the only evidence admissible: That the release, if properly and fairly *executed*, was a flat bar at law, and that the remedy of the plaintiff, as to the alleged fraud, could only be found in a Court of Equity.

The presiding Judge ruled, however, that the plaintiffs had a right to go broadly into the whole matter, and show fraud in the *consideration of the release*; to which opinion, the defendants excepted.

The plaintiffs then called witnesses to show, that the release, set forth in the plea, was obtained by the defendants, after they had become insolvent, under false representations as to their real situation and means of payment. The defendants, it appeared, had been merchants in New-York, and there had also been a certain house in New-Orleans, transacting business there, under the firm of Cromelien, Davies & Co., in which the only *ostensible* partners were David Cromelien and David Davies. Both these houses failed at or about the beginning of the year 1826, and the defendants, during that year, employed themselves in making compromises with their creditors. In the course of their negotiations, it appeared that *Rowland Davies*, (one of the defendants,) made representations to the creditors, as to their property and means of payment, which turned out afterwards, to be essentially

incorrect ; and which were, as the plaintiffs contended, false and fraudulent. These incorrect or false representations, were all made by *Rowland Davies* ; but on one occasion they were made in the presence of *John*, the other defendant, who did not correct or contradict them. They principally related to a debt of 20,000 dollars, said to be due to the defendants, from *Cromelien, Davies & Co.*, which *Rowland Davies* represented as almost a total loss ; but from which the defendants afterwards realized a considerable sum.

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The basis of the release, (as the witness of the plaintiffs testified,) or the chief reason for granting it, was the alleged loss, sustained by the defendants, in the failure of *Cromelien, Davies & Co.* The plaintiffs claimed, at the time it was executed, a balance of seventy thousand dollars and upwards, and the defendants admitted a considerable sum due, (21,000 dollars,) but represented themselves as unable to pay more than 2,500 dollars to the plaintiffs, as a compromise. The negotiations for the release were protracted for a considerable time, the *plaintiffs* claiming, on their part, a *release from the defendants* of the same character, with that, which they were to give. This the defendants, for a considerable period, (nearly a year,) refused to give, alleging that they were fearful that the plaintiffs, by virtue of a power of attorney, which they held from the defendants, had contracted debts in their names ; but, upon receiving an affidavit from the plaintiffs, denying any such cause of danger, the parties finally arranged their difficulties, *executed mutual releases* in the presence of a witness, and *delivered* the same in pursuance of the previous arrangements.

The defendants also obtained, from others of their creditors, releases of a like tenor, with that executed by the plaintiffs, and they delivered into the hands of certain assignees, a considerable amount of property to be distributed among them, of which the plaintiffs were to receive 8,500 dollars. It appeared, however, that the property delivered to the assignees, did not produce the amount contemplated, and the plaintiffs' proportion falling short about two thousand dollars, they, as soon as all the facts of the case had come to their knowledge, refused to complete the arrangement, and brought this action to recover the balance of their

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account. At the trial, the plaintiffs offered in court, to cancel the release received from the defendants, if they would cancel that pleaded in bar of the action; but this the defendants refused to do.

Most of the facts, relative to the release, were proved by the testimony of one of the creditors, (John Jewett,) who had acted as an agent between the parties, and had himself given the defendants a release, founded upon the same consideration with that furnished by the plaintiffs. His testimony was objected to, at the trial, by the defendants; but the objection was overruled by the presiding Judge. After the testimony on the part of the plaintiffs was closed, the defendants moved for a nonsuit, upon the same grounds which were afterwards urged for a new trial; but the motion was overruled. Having excepted to the decision of the Judge, they opened their defence, and called witnesses to sustain it. They denied that any thing was due, upon a fair statement of the accounts, to the plaintiffs, although they admitted, that they supposed that there was a considerable balance against them, at the time the release was executed; and they introduced evidence to show, that there was, in fact, a balance due to them from the plaintiffs. The Judge remarked, that he would not go into a minute examination of the accounts, but would direct the jury, if they should find a verdict for the plaintiffs, to find a nominal sum, sufficient to cover their entire demand, subject to such an adjustment of the accounts, as the court might afterwards direct. This course was objected to on the part of the defendants, when the charge was given to the jury, but all the accounts between the parties were laid before them.

The defendants also called witnesses to prove, that the plaintiffs, before the release was executed, had full access to the books and papers of Cromelien, Davies & Co., had examined their accounts, and understood their situation perfectly well. That they executed the release, with due consideration, after all the facts relative to their situation were known, and that they were in no way deceived as to the true circumstances of the case. Among others, they called *David Davies*, the partner in the house at New-Orleans, who testified, that the plaintiffs were general partners with Cromelien, Davies & Co., and that they became such in the summer of 1824, although the agreement of partnership was not re-

duced to writing ; and this testimony was fully supported by two other witnesses.

The plaintiffs, for the purpose of discrediting the testimony of Davies, as to the partnership, offered in evidence a bill in chancery, filed by him against Cromelien, after their failure, wherein nothing was said of the connexion between the plaintiff and the New-Orleans' house. This bill was neither sworn to nor signed by the witness, but had been filed by his solicitor. He testified that his counsel stated to him, in general terms, what the bill would contain, but that he did not see it, either before or after it was filed, and that he was ignorant of its particular contents.

The defendants objected to the reading of this bill ; but the presiding Judge overruling the objection, allowed it to be read to the jury, and the defendants excepted to his decision.

A considerable amount of testimony was offered, by both parties, to sustain their respective allegations, which it is not necessary to detail ; the defendants denying that any balance was due to the plaintiffs, and insisting that they were partners with Cromelien & Davies, of New-Orleans.

The plaintiffs on their part, offered evidence to sustain their whole demand, to prove fraud in the consideration of the release, and to contradict the defendants' allegation, as to the partnership.

The Judge charged the jury, that they must be satisfied, in the first place, that there was fraud as to the consideration of the release, on the part of the defendant, *John Davies*, as well as of Rowland, otherwise the action could not be sustained ; and that in weighing the testimony on this subject against John, they must leave out of view the representations alleged to have been made by Rowland. He also charged them, that if they should be of opinion that there was a partnership between the plaintiffs and Cromelien, Davies & Co., that then the action could not be maintained. That the testimony, as to this point on the part of the defendants, was positive, while that on the part of the plaintiffs was chiefly of a negative character ; but that they must decide upon the question of partnership as a matter of fact. That as to the release, there appeared to have been no want of deliberation in preparing and executing it. That if they should find that the plaintiffs had access to the books of Cromelien, Davies & Co.,

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containing the accounts of the defendants, and disclosing what was now said to be misrepresented, or if they should find that they had acquired the same knowledge *aliumde*, that then they should find for the defendants, because in such a case there could have been no false representations: that the mutual releases were not important in the case, although they presented a peculiar feature in it, having been delayed for a long time, in consequence of the refusal on the part of the defendants to execute that which was held by the plaintiffs. That if the jury found, that in point of fact, the defendants were not indebted to the plaintiffs, then, that the verdict should be for the defendants on the issue, because there could be no fraud. He also charged them, if they found for the plaintiffs, that they might find a *nominal sum*, and the court would afterwards direct a liquidation of the accounts.

To the last part of this charge, the defendants objected, contending that it was the business of the plaintiffs to prove their claim *precisely*. That if the question of fraud was left to the jury, they ought also to find the amount due to the plaintiffs, the two questions being so connected that they ought not to be investigated and decided by different persons, and that the law did not authorize a trial of only a part of a cause by the jury.

The jury returned a verdict for *one hundred thousand dollars* in favor of the plaintiffs.

The defendants now moved for a new trial, and *Mr. R. Sedgwick* and *Mr. Anthon* in support of the motion contended, that the evidence offered to prove fraud, in the release, was inadmissible, and ought to have been overruled. That the issue joined upon the third plea was purely technical, and presented a question as to the *manner* in which the discharge was procured, not as to the consideration upon which it was founded. That the release, if properly executed and duly delivered, presented a flat bar at law, unless the plaintiffs could show that the instrument itself was a different one from that which they intended to execute, and that it was fraudulently procured by the defendants. The validity of the deed, (they said,) when legally delivered, and there is no fraud or mistake as to its execution, cannot be tried in a court of law, but the party which sets up a want of consideration, or a fraud, which reaches beyond the execution of the instrument,

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must go into a Court of Equity, and obtain an issue there, upon which the validity of the instrument may be tried. And a Court of Chancery does not, on all occasions, as a matter of course, declare the instrument void, but it takes care to administer justice between the parties, according to the very right of the case.

In the case now before the court, there are *mutual* releases, and if the efficacy of the defendant's discharge is destroyed by the verdict of the jury, what is to prevent the plaintiffs from availing themselves of that which they hold from the defendants, whenever it may become necessary for them to use it as a defence? Even if there was fraud in the consideration of the discharge given to the defendants, it does not follow that there is any legal objection to that which the plaintiffs received. Now there would be manifest injustice in destroying the release of the defendants, in this collateral way, leaving that held by the plaintiffs to retain all its efficacy. The fraud set up here, is a fraud in the consideration; but a part of the very consideration for the discharge given to the defendants, is the release obtained *from* them. It is in evidence, that the plaintiffs deemed the release, given by the defendants, a matter of vital importance in the compromise between them, which was delayed nearly a year in consequence of a reluctance, on the part of the defendants, to grant it. If the release held by the defendants, is destroyed, then, that held by the plaintiffs ought not to remain, and the plaintiffs cannot escape from the obvious force of this remark, by producing their offer to cancel both instruments. The effect of their offer was to anticipate the decision of the proper tribunals, and the defendants were not bound to accede to it. They had a right to rely on the protection afforded by the discharge, without resorting to a dilatory and expensive examination of all the transactions between themselves, and the plaintiffs. If the discharge was deliberately executed, (and that it was is fully proved,) if the plaintiffs put their hands and seals to the very instrument which they intended to deliver; if they understood its contents, and were aware of the effect of their own deliberate act, a court of law cannot take away from the defendants the protection afforded by the deed. The release pleaded, is a flat bar at law, and its effect cannot be evaded in this collateral way.

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If it were conceded, that the decisions of the English courts favor the positions assumed by the plaintiffs, those taken by the defendants are fully supported by the repeated decisions of our own courts. From some expressions used in *Starkie's Treatise on Evidence*, and in *Saunders on Pleading*, it would seem that *doubts* exist in England, whether fraud, in the consideration of a release, may not be set up at law, to avoid its effects. But the subject in this state is not a matter of doubt,—it has been settled, and that too, upon principles perfectly satisfactory. The Judge's decision upon this point was, therefore, erroneous, and a new trial must be granted to correct the error, and give that effect to the release which is secured to it by law. [ *Com. Dig. Plead.* 27 R. 14 W. *Saund. on P. and E.* 527. *Vrooman v. Phelps*, 2 J. R. 177. *Dorr v. Munsel*, 13 J. R. 431. *Franchot v. Leach*, 5 Cowen's R. 508. *Jackson v. Hill*, 8 Ib. 294. *Champion v. White*, 5 Cowen's R. 510. 1 *Hopkin's R.* 284. 4 *Swanst. R.* 444.]

II. The plaintiffs ought to have been nonsuited at the trial: 1st, because there was no proof of any debt due to them; 2dly, because there were mutual releases, and because the plaintiffs refused to cancel their own, while repudiating that held by the defendants.

III. The bill in chancery was illegal evidence, and ought not to have been admitted. If it had been *sworn to*, it might probably have been read, as containing admissions of the witness under oath, which he could not gainsay. If he had *read* it even, it might have been considered as containing statements contradictory to those made on the trial. But a bill filed by counsel has never been held to furnish evidence against the complainant. [*Peake's Ev.* 54. 2 *Stark. Ev.* 287. 2 *Sel. N. P.* 712.]

IV. The Judge erred in charging the jury to find a nominal sum for the plaintiffs, in case the verdict was in their favor. The jury were bound, if the case was committed to them, to find as to the amount of the debt, as well as the fraud. If the discharge was void, then the accounts between the parties were open, and should have been passed upon by the jury. The Judge gave to

them the power of deciding, as upon a special issue out of chancery. He had no authority for this under the statute in relation to referees, and no precedent for it can be found, either here or in England.

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V. The verdict was against law and evidence, there being no sufficient proof of a debt due to the plaintiffs; and the jury should have found for the defendants, on the ground of the partnership between Cromelien, Davies & Co. and the plaintiff, which was distinctly proved by three witnesses.

*Mr. J. W. Gerard, contra,* for the plaintiffs, contended, in the first place, that there could be no doubt as to the fact of the fraud practised by the defendants on the plaintiffs, for the purpose of procuring the discharge. That the delay in the compromise was occasioned by the reluctance on the part of the plaintiffs to grant the release, and it was finally obtained by false pretences and fraudulent representations. That this fact had been found by the jury, to whom the evidence on the subject was committed, under a charge, in most respects, eminently favorable to the defendants. That the court would, therefore, consider the point as established, (as it was not attacked by the defendants' counsel,) that the release would not have been granted to the defendants, but for their own fraudulent representations and false pretences.

The question then is, (he said,) whether the defendants can avail themselves of a discharge obtained by fraud, to defeat an action at law brought to recover a debt due from them? Whether in any court, fraud itself can be interposed by the guilty party, as a defence to an honest demand. It is an obvious principle of law, that no man can take advantage of his own wrong; and the question is, whether this principle is to find an exception in the present case.

The principle upon which the replication rests, is to be found in the first of *Chitty's Pleadings*, 553, and the precedents to support it, are to be found in the second of *Chitty*, pages 464 and 610. The defendants cannot narrow the issue in which they have joined; and having alleged that the release was ob-

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tained "fairly, and without fraud or covin," they are bound to abide by the question which they have consented to try. A release obtained by fraud is void; it is no discharge, it cannot furnish a defence; and when the jury declared by their verdict, that the release was not obtained fairly, but was procured by fraud, it ceased to be an impediment in the way of the other questions, to be considered by them.

In the cases cited for the defendants, there was no issue joined upon the question of fraud; but the opinions of the court were elicited chiefly upon the pleadings; and all their decisions go upon the ground, that a failure of consideration will not at law avoid a deed. The consideration in the case before the court has not failed, and we do not impeach the release for that cause. We say that the release is void because fraudulent, and being void, it cannot be used as a defence at all. An issue was joined upon the question of fraud, by which the fact is found, and that question being settled, the law pronounces the release void. If the issue tendered by the replication was immaterial or improper, why did not the defendants demur? We set forth a fact, which we supposed was sufficient to avoid the deed. The defendants, instead of saying, by a demurrer, that the facts set up in the replication could not affect the release, denied their existence by a rejoinder, and challenged the proof. They are, therefore, concluded by an issue voluntarily accepted by themselves, but which they could not support. If the release be a bar to this action, then fraud itself, distinctly found upon an issue for that purpose joined, affords as good a defence at law as honesty. We consider the plea as well founded in principle, and supported by numerous decisions. [3 Stark. Ev. 1293, *release*. 2 Ib. 586. 3 J. R. 317. 2 Wils. R. 347. 1 Bos. and Pul. 447. 7 J. R. 421. 6 Ib. 263. 3 Chit. Comm. Law. 691. 1 Cox's Rep. 178. 2 Sound. on P. and E. 527. 2 Bridg. In. FRAUD. 15 J. R. 145. 3 Bac. Ab. fraud, 320 (*note.*) 1 Burr's R. 396. 2 J. Ves. Jun. 295. 2 P. Wms. 156. 220. 2 Har. and John. 487. 7 Mass. R. 118.]

II. If the release was fraudulent and void as to one, it was void as to both of the defendants. [3 Cowen's R. 577.] But this is

not material, because the jury have found that there was actual fraud on the part of the defendant, *Johs*, as well as Rowland. The former was present when the false representations of the latter were made; and as they related to a matter of mutual interest, and were not contradicted nor corrected by him, he became a partner in the fraud, and must abide by its consequences.

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III. As to the bill in chancery, it was produced to show that the witness had made representations which were at variance with his testimony. If the bill was not sworn to, or subscribed by him, he must nevertheless, have known its contents, and have given them his sanction. He testifies that his counsel told him what the bill would contain: how could his counsel tell him facts to be set forth in the bill, unless they were first communicated to him by his client? The bill was good evidence of declarations made by the witness himself, as to the partnership which he contradicted afterwards by his testimony; and if there is any unexceptionable mode of contradicting a witness out of his own mouth, this must be one. [1 *Stark. Ev.* 286-7.]

IV. The direction of the Judge, as to the nominal sum for which the verdict was to be rendered, was unexceptionable. In the first place, there were long accounts between the parties, embracing a great variety of items, requiring a more strict examination than a jury could give them. The cause, at its outset, could not have been sent to referees, because the issue joined upon the third plea was to be disposed of. The Judge was not bound to go through with long bills of particulars, which would be better settled by referees. The same course has been pursued on other occasions in this court, and the practice is not only unobjectionable, but very convenient and useful.

V. The verdict is fully supported by the evidence and by the law, and the defendants cannot complain of the charge; it was highly favorable to them, and had, beyond a doubt, much weight with the jury. As the defendants placed the stakes for which

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they contended before the jury, they cannot withdraw them now, but must abide the issue.

OAKLEY, J. On the trial of this cause, one David Davies was introduced as a witness, by the defendants. The plaintiffs, with a view to rebut his evidence, offered a bill in chancery, filed by him, which contained allegations contradictory to his testimony on the present occasion. The witness stated, that the bill had been filed by his counsel, and that he believed his counsel had stated to him what he intended to insert in it, but that he, (the witness,) had never read it. The bill was not signed or sworn to by the witness, but was admitted in evidence, although objected to by the defendants.

The general rule seems now to be, that a bill in chancery will not be evidence of the facts stated in it, against the party filing it, although it is evidence to show the fact, that such a bill has been filed, in order to introduce the answer, or the depositions of witnesses. [1 Phil. Evi. 263. 7 Term R. 2. *Case of the Bumby Peerage, 2 Stark. Evi. 286, in notis.*] In the present case, it could have no effect, except to discredit the witness, by showing that he had made declarations and statements in conflict with his testimony on this trial. If the bill had been sworn to, or signed by him, it might have been set up as his written statement of facts; but in its present shape, it can only be considered as the suggestions of his counsel. Though his counsel may have told him what he intended to insert in the bill, there is nothing to show that it was, in fact, drawn according to the information thus given, and it might have contained many averments, of which the witness was entirely ignorant. In any view of the matter, it does not appear to me that the filing of the bill is shown to be so far the personal act of the witness, as to charge him with the knowledge of the statements it contained. It was, therefore, in my judgment, improperly admitted in evidence.

2. The Judge, without the consent of the defendants, and notwithstanding objections interposed by them, directed the jury, if they found for the plaintiffs, to find a nominal sum, sufficient to cover their demand, subject to a reference to liquidate the ac-

counts, and ascertain the balance. The defendants now object to this as irregular.

I am not aware, that either with us, or in England, the courts have claimed a right, without the consent of the parties, to direct such a verdict. It is a practice very convenient, and it is much to be desired, that the courts should possess authority to adopt it. But the right to refer a cause at all, depends upon the statute, and that clearly contemplates only references to be made before the trial. If the parties put themselves upon the jury and go to trial, each has a right to submit his whole case to them, and all that the court can do, if it becomes apparent that the trial will require the examination of long and intricate accounts, is to discontinue it, and direct an application for a reference in the usual mode. There would seem, therefore, in this respect, to have been an irregularity at the trial of this cause, and this nominal verdict cannot be permitted to stand.

Though, for the reasons above stated, a new trial must be granted, still it will, no doubt, be useful to the parties, to dispose of the main question on which the cause must finally depend.

The declaration contains the common counts in *assumpsit*, to which the defendants pleaded a release under the seal of the plaintiffs. The plaintiffs replied, that the release was "had and obtained from them, by the fraud and covin of the defendants," on which issue was joined. At the trial, the plaintiffs, to support this issue, offered to show fraud, on the part of the defendants, in the consideration on which the release was founded. The defendants contended, that the proof ought to be confined to fraud, in the execution of it only, and that if such fraud was not shown, the release was a flat bar at law. The Judge permitted the plaintiffs to go into the evidence offered, and they proceeded to prove, that the plaintiffs were creditors, to a large amount, of the defendants, that a negotiation between them was set on foot, and continued for a considerable time, for a compromise of the debt. That mutual releases were finally executed, and that in the course of the negotiation, the defendants made certain false and fraudulent representations of their situation and property, whereby the plaintiffs were deceived into a compromise of their debt, at a much

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lower rate, than they otherwise would have accepted, and much lower than the defendants were in fact able to pay, and that the release in question, was executed in consequence of such false and fraudulent representations.

The question now is, whether this evidence was admissible, under the issue joined in the cause.

It is contended on the part of the defendants, that the only fraud which can be pleaded at law, to avoid a deed, is fraud in its execution; such as a fraudulent reading of it, or the substitution of one instrument for another, or the obtaining, by some device or fraudulent representation, such an instrument as the party did not intend to give. On looking at the cases decided by the Supreme Court, it seems to me, that the position of the defendants' counsel is fully supported.

In *Vrooman v. Phelps*, [2 J. R. 177,] the action was covenant on an obligation for the payment of money. The defendant pleaded, specially, that the consideration of the covenant was the purchase of a slave, and that the plaintiff fraudulently and falsely represented the slave as honest, &c. To this plea there was a demurrer. The court held the demurrer well taken, and they lay down the principle broadly, that "parol representations as to the quality of a thing, made antecedent to the contract, though false and fraudulent, and though they may have induced the defendant to make the purchase," cannot be pleaded to avoid a specialty. In *Dorr v. Munsell*, [13 J. R. 430,] the defendant pleaded to an action of debt on bond, that the plaintiff fraudulently obtained it, by representing himself to be the patentee of a certain improvement in the manufacture of cloth, and that he was the original inventor, when in fact, it had been previously patented to another, and the plaintiff was not the inventor, and that the defendant was induced by such fraudulent representations to execute the bond, which was given for a right to use the said improvement, &c. To this plea there was a demurrer, which was sustained. The court recognized the authority of *Vrooman v. Johnson*, and again said, that, at law, the defendant cannot avoid a solemn deed, on the ground of a want of con-

sideration, and that the inquiry is precluded by the nature of the instrument.

In *Franchot v. Leach*, [5 Cowen's R. 506,] the action was covenant, on an agreement by the plaintiff, to sell and convey a lot of land, for a certain sum of money, agreed to be paid by the defendant. The defendant offered to prove, that he purchased the lot for the purpose of a distillery, which the plaintiff knew, and falsely represented to the defendant, that a stream of water, running through the lot, was sufficient for that purpose, knowing the contrary to be the truth. The evidence was rejected, and the court held, that it was properly rejected. They said, that the case of *Dorr v. Mansell* was in point, and they state the principle to be, that the fraud, which "avoids a deed, is not a fraudulent representation as to the consideration, but a fraud relating to the execution of it, as a fraudulent misreading, or obtaining such an instrument as the obligee did not intend to give."

In *Jackson ex dem. Church v. Hills*, [8 Cowen's R. 290,] the plaintiff sought to recover, by virtue of a lease under seal, from the defendant. The defence was, that the lease was obtained by certain fraudulent representations, as to a part of the consideration or inducement to the making of the lease. The court held, that this defence could not prevail, and they adopt the principle, in terms, that "if the consideration of a specialty, be *unlawful or corrupt*, it is "void *ab initio*, and may be pleaded, but that the mere failure or "want of consideration, is not sufficient, at law, to avoid a specialty." The court, in that case, revised all the preceding cases, and recognized the principles upon which they were decided, and in reference to the case then before them, *Sutherland, J.* who delivered the opinion, said, that the lease in question, was executed upon an adequate consideration, "with full knowledge, on the "part of the lessee, of what she was doing, and of its legal effect "and operation, but under a misapprehension as to a collateral "circumstance, occasioned by the false and fraudulent representations of the lessee. I know of no principle," says the Judge, "on which such a lease can be avoided at law."

The result of all these cases seems clearly to be, that when the consideration of a deed is not *illegal or corrupt*, so as to render it

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void, *ab initio*, and when it is executed, understandingly, and with a knowledge of its legal import and effect, no plea at law can impeach it. The party is concluded by the nature of the instrument, and cannot be permitted to aver any thing against it.

In the case now before us, the release in question was executed upon an "adequate consideration," to wit, the money paid by the defendants, and the release given by them to the plaintiffs. It was executed deliberately, and with a full knowledge of its legal effect, but under a misapprehension as to the ability of the defendants to pay their debts, induced by the false and fraudulent representations of the defendants. The case seems in all respects, to fall within the principles laid down in *Jackson ex dem. Church v. Hills*, and must, in my judgment, be governed by them. I have not deemed it necessary, to enter into an examination of the numerous English cases, cited by the plaintiffs on the argument. I consider the principles, which must govern us, as fully established in our own courts.

The remedy of the plaintiffs, is in the Court of Chancery. That court, in the case of *Irving v. Humphrey*, [1 Hop. R. 284,] recognized it as a settled rule, that if a debtor, upon a compromise with his creditors, make any material false representation, as to his property, it will avoid any deed, by which the creditors may have discharged him. But in such cases, that court does not always set aside the compromise entirely, but will order the debtor to account for any property which he may appear to have concealed. Relief will be granted in that court, according to the circumstances of the case, and the rights of all the creditors will be protected. In the case we are now considering, there is one feature which shows, in a peculiar manner, the reason why it should be turned over to a Court of Equity. The release executed by the defendants to the plaintiffs, must, for any thing I can see, be valid at law, though the plaintiffs were on this occasion to succeed in avoiding the one executed by them. There was clearly no fraud of any kind on the part of the plaintiffs in obtaining it, and the only plea, which at law the defendants could interpose against that release, if set up by the plaintiffs on some future occasion, would be a mere failure of the consideration, on which it was executed.

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This most clearly could not be done, without overturning all the cases on the subject. In the Court of Chancery, the rights and interests of all the parties can be duly guarded, and if the plaintiffs should succeed in avoiding the compromise with the defendants, they would, at the same time, be compelled to cancel the release to themselves. That they offered to do so, in the present case, cannot affect or extend their rights at law, as the offer from the nature of the proceedings at law, must be considered merely as voluntary.

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*New trial granted.*

[J. W. Gerard, Atty for the p[ro]f[essor]. Wells and Bushnell, Atty's for the def[endants].]

### JOHN H. STURTEVANT versus HENRY WATERBURY.

The plaintiff recovered a judgment for 5000 dollars from different persons, in an action of trespass *de bonis asportatis*; but no execution was ever issued upon, nor was any satisfaction ever obtained of, the judgment. The defendant received into his possession the goods, (or a part of them,) which were the subject of the action of trespass,—sold them, and took the proceeds. In an action of *assumpsit* against him, for money had and received, (being the proceeds of the goods sold,) it was HELD that the action was well brought, and could be sustained.

When trespass or trover will lie, if the wrong-doer has converted the property into money, the plaintiff may waive the *tort*, and bring *assumpsit*.

THIS was an action of *assumpsit* for money had and received ; the declaration containing the common counts, to which the defendant pleaded the general issue. At the trial of the cause, it appeared, that several months before the present action was commenced, the plaintiff had instituted a suit, in the Supreme Court, against one Jera Waterbury, Micaiah Moore, John N. Brush, and Francis Dustan, for trespass *de bonis asportatis*, and that upon the trial of that action, he had recovered a verdict against them for 5000 dollars, upon which a judgment was afterwards entered up;

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but no satisfaction of the judgment was ever obtained, nor did the plaintiff ever issue an execution upon it.

Upon the trial of the *present* suit, the plaintiff called two of the jurors, before whom the action of trespass was tried, and proved by them, that, upon the trial of *that* action, the present defendant, being called as a witness, testified that "he had received certain "goods, which were the subject of controversy in that cause, into "a house occupied by himself and his brother, Jera Waterbury;— "which goods, the defendant afterwards, by the direction of his "brother, sold by auction, and received the proceeds,—amounting "to about 700 dollars. The defendant also testified, that he "held said proceeds at the time of the trial of the action of trespass, "for the purpose of paying a note of 200 dollars, which he, as "one of the firm of Henry and Jera Waterbury, held against the "plaintiff, and the balance for the plaintiff, or the parties entitled "to it. After the goods were received by the defendant, they "were placed under lock and key until sent to auction; and af- "ter the sale, he gave notice to the creditors of the plaintiff that "the balance of said proceeds, after deducting the note, would "be paid over to them, or any one who had the legal right to it."

The defendant, on his part, called Moore, one of the defendants in the former suit, as a witness, and he testified, that at the time the goods, which were the subject of that action, were taken, the plaintiff and himself were partners; that the goods were taken to the house of the defendant and Jera Waterbury, for the purpose of being sold, and paying the debt due them on said note, and ap- plying the balance towards the payment of other debts due from the plaintiff and himself. That the defendant received the pro- ceeds of said sale, and, after the trial of the action of trespass, paid the proceeds over to the witness, deducting therefrom the amount of said note.

The plaintiff then called witnesses to contradict the testimony of Moore, and show that he never had been a partner with the plaintiff. That the goods in question were taken from his store, at a time when he was absent from the city, by means of a combi- nation or conspiracy formed by the defendants in the action of trespass, one part of which was, to represent Moore as a partner,

in order to give a color of right to a high-handed trespass and outrage upon his property. But it did not appear, by any positive proof, that the defendant had joined in the combination, or that he knew from whence the goods came, which were put into his hands.

The defendant, after producing the record of the judgment in the action of trespass, contended that the recovery in that action was a bar to any recovery in this. The Chief Justice, before whom the cause was tried, reserved that question, and directed the jury to find a verdict for the plaintiff, if they should be of opinion that Moore was *not* a partner with the plaintiff. The jury returned a verdict in favor of the plaintiff for the whole amount for which the goods were sold at auction, together with interest, amounting to 900 dollars and upwards.

A case was thereupon made by the defendant, which either party had leave to turn into a bill of exceptions, or a special verdict.

*Mr. J. Anthon* and *Mr. Slosson*, for the defendant, now contend that the defendant was not entitled to judgment on the verdict. That in trespass, all are principals, and that the defendant, by receiving and disposing of the goods, became a principal and joint trespasser. [*Marsh v. Berry*, 7 *Cowen's R.* 344. 6 *Com. Dig.* 392. *Tresp. C.* 1.]

2. That the plaintiff, by the judgment and recovery in *trespass* against the co-trespassers, elected his remedy, and could not maintain *assumpsit* against this defendant, for the same act. [ *Co. Lit.* 144 b. 145 a. 2 *Com. on Contr.* 558-9. *Kitchen v. Campbell, 3 Wills,* 304. 308. 4 *J. R.* 474. 1 *Pick. R.* 62. 18 *J. R.* 459. *Heyden's case*, 11 *Coke*, 5. *Bacon's Abrid. damages*, D. 4.]

3. The rule, (they said,) that a recovery without satisfaction is not a bar to another action in tort for the same trespass, is founded on the principle, that the plaintiff may elect *de melioribus damnis*, which cannot apply to actions inconsistent with each other, as *trespass and assumpsit*, or to actions founded on distinct causes of action.

4. In all cases, therefore, where this election does not exist, a

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prior recovery must necessarily transfer the title, and be a bar. [2 *Stern. R.* 1078. *Cas. temp. Hard.* 319. 4 *Esp. R.* 251. 7 *Cranch*, 565.] Can the plaintiff recover the amount of the goods *in addition* to the amount, which must have been allowed for the same goods in the action of trespass? The former recovery, even without satisfaction, would transfer the title to the goods, except as against a joint trespasser. If the goods be sold, that sale cannot be questioned after a recovery in trespass or trover, and here it is perfectly apparent, that the plaintiff will have two satisfactions for one wrong.

*Mr. Hugh Maxwell, contra*, for the plaintiff, contended, that as there was no *satisfaction* of the judgment against Jera Waterbury and others, the mere recovery, without satisfaction, did not change the property in the chattel. [8. *Cowen's R.* 43.] The defendant, (he said) admitted that the goods were not his; he admitted also that he held the proceeds of them for the lawful owner,—and the plaintiff is that person. As for the set-off claimed by the defendant, that is totally inadmissible, it being for a partnership and not for an individual claim. Besides, as the money was obtained tortiously, no right of set-off could exist. [The defendants' counsel admitted that the claim for a set-off could not be maintained, and waived that point on the argument.]

II. A plaintiff may waive his action in *tort*, and proceed to recover the price of the chattel received by the tort-feasor, in an action for money had and received. [2 *Ld. Ray.* 1216. 1 *Mou. Sel.* 584.]

In this case, the defendant was not a joint trespasser, and if he had been joined as a defendant in the original suit, he would, in all probability, have been acquitted. We have shown that he has the proceeds of our property in his hands, and he admits that it is held for the right owner. What shall be done with it? Shall he hold it as his own, or deliver it over to the wrong doers, and leave us to our judgment against *them*? It was probably a part of the original conspiracy, that the property, or some part of it, should be

placed beyond the reach of a process against the original trespassers; and to defeat this recovery, would be to carry the original combination into complete effect by the forms of the law.

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1839.

Sturtevant  
v.  
Waterbury.

OAKLEY, J. This was an action of *assumpsit* for money had and received. It appeared on the trial, that the plaintiff had recovered a judgment for \$5000, in an action of trespass *de bonis asportatis*, against *Jera Waterbury, Micah Moore* and others, (of whom the defendant was not one) but that no execution had been issued, and no satisfaction of the same, or any part of it, had been obtained. It also appeared, that the defendant had received the goods, or a part of them, for the taking of which that action was brought, and that he subsequently sold the goods and received the avails.

The question is, whether this action of *assumpsit* can be maintained. In *Livingston v. Bishop*, [1 J. R. 290,] it was decided by the Supreme Court, that when separate actions are brought against joint-trespassers, the plaintiff may recover against each, but shall have but one satisfaction. In *Osterhout v. Roberts*, [8 Cowen's R. 43,] it was held, that in an action of trover against one defendant, it was no defence that another had been sued in a similar action for the same chattel, and that judgment had been obtained, and the party charged on execution, if no actual satisfaction had been received; and that the property of the plaintiff, in the subject matter of the suit, was not changed by the judgment and execution, without satisfaction.

These cases fully establish, that the plaintiff, in the present instance, might maintain an action of trespass against the defendant, if the evidence in the case was sufficient to charge him as a trespasser, and that his property, in the goods in question, was not changed or divested by the judgment obtained by the other trespassers.

It seems also to be well settled, that where trespass or trover will lie, if the wrong doer has converted the property into money, the plaintiff may waive the tort, and bring his action of *assumpsit*. [2 Com. on Con. 558. *Parker v. Norton*. 6 D. and E. 695. *Lamine v. Dorrell*. 2 Id. Ray, 1216. *Allanson v. Atkinson*. 1 Mau. and Sel. 587.] It is, however, contended by the

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defendant, that the plaintiff, having made his election in this case to proceed for a tort, is thereby concluded, and that he cannot afterwards affirm the sale of the goods by the defendant, and sue on the implied contract arising from the receipt of the money. This might be so, if the defendant had been a party to the action of trespass. It was so held in *Ketcham v. Campbell*, [3 Wils. 304,] and the reason upon which the principle rests, is there stated to be, that you shall not bring the *same cause of action* twice to a final determination. *Nemo debet bis vexari pro eadem causa*; and the court say, what is meant by the *same cause of action* is, where the *same evidence* will support both actions. It is manifest, that the principle of that case has no application to the present. Here no other action was ever brought against the defendant. It rests upon a different ground altogether from the trespass, and must be supported by different evidence. If it were clear that the defendant could have been sued in an action of trespass, I see no reason, upon authority or upon principle, why the plaintiff, *as to him*, may not waive the trespass and sue in *assumpsit*. It is the more favorable action for the defendant, as the recovery must be restricted to the amount actually received.

It is objected by the defendant, that as the value of the goods must have been included in the verdict, in the former cause, if the plaintiff recover here, he may obtain a double satisfaction. The same remark would apply to separate recoveries, on a joint and several bond, or against the maker and endorser of a note, which are cases of daily occurrence. The remedy, in all such cases, is by an application to the equitable power of the court, by way of motion, or if the party prefer it, by an *audita querela*.

Such would be my view of the case, if the evidence showed that the defendant might have been joined in the action of trespass against Moore and others. But in fact, he does not appear to have been a joint trespasser although he received the goods, and kept them in his possession until the sale; there is no proof to show that he knew, that they had been taken from the store of the plaintiff; certainly not, that they had been improperly taken. When the defendant sold the goods at auction, they still continued the property of the plaintiff, unless that property was changed by

the judgment against the trespassers, who had wrongfully taken them from his possession. Such, upon the authority of the cases before cited, was not the effect of that judgment. The plaintiff then had a right to reclaim his goods wherever he could find them. He might have sued the defendant in *trotter*, or he might affirm the sale of the goods by him, and recover the proceeds in this action of *assumpsit*. The defendant, in fact, never claimed any right to the goods, or their proceeds, but declared he held the latter for the plaintiff, or whoever might appear to be entitled to them, after paying a note held by him and his brother against the plaintiff. His subsequent payment of the proceeds of the goods to *Moore*, who had no right to receive them, cannot exonerate him from his liability to account to the plaintiff.

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1828.

Sturtevant  
v.  
Waterbury.

*Judgment for the plaintiff.*

[W. P. Hawes, Atty for the plif. W. Storson, Atty for the deft.]

*Note.*—This cause was twice tried. Upon the first trial, when *Moore* was offered as a witness, he was objected to by the plaintiff, and excluded by the Judge. The question being brought before the court, a new trial was granted, upon the ground that *Moore* was improperly rejected. The defendant did not offer to show that he was intrusted in the goods, but that he was a partner with *Sturtevant*, and that fact, the court held might be proved by *Moore* himself.

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1829.

Myers  
v.  
Dixon.

STEPHEN MYERS versus ELIAS DIXON.

Although an action of debt upon an arbitration bond, cannot be sustained, where the award is not made within the time specified in the condition, and the parties have, by a new agreement, extended the time for making the award; yet where the declaration sets forth the bond, the *enlargement of the time* by the new agreement, an award within the extended period, and a breach of its requirements, on the part of the defendant, it contains a complete cause of action.

To an action of debt, wherein the above particulars were all set forth, the defendant, by plea, set out the original arbitration bond, and the award, whereby it appeared that the award was not made within the period originally stipulated. Upon demurrer to this plea, it was held not to be an answer to the declaration—no notice being taken in it of the allegations in the declaration, as to the enlarged time.

THIS was an action of debt, founded upon a submission to arbitration, and the award made in pursuance of it. The declaration, in its first count, set forth, that certain differences having arisen between the plaintiff and the defendant, the parties, by a certain *bond* of arbitration, bearing date the 9th day of February, 1829, became bound to each other, in a certain penal sum, to abide by the award of certain arbitrators, therein named, who were to decide all matters in controversy between them, and make their award in writing, and under seal, on or before the 25th day of the same month; which time for making the award, (the declaration alleged,) was afterwards, and before the time for making the same expired, to wit, on the 25th day of February, 1829, by consent of the plaintiff and defendant, “*enlarged until the 6th day of March, then next,*” it being agreed, by the parties, that the award made within the extended time, should be binding and conclusive upon them. This count then averred, that the arbitrators duly made their award within the time, for that purpose last appointed, determining thereby that the defendant was indebted to the plaintiff in the sum of 1,324 dollars, to be paid by him on or before the 21st of March, 1829, of which the defendant had notice; yet the said Stephen Myers did not, nor would, at the time, for that purpose in the award appointed, or at any other time, pay

to the plaintiff the said sum of 1,324 dollars, or any part thereof, although requested, whereby an action accrued to the plaintiff to recover the amount of said award.

In answer to this count of the declaration, the defendant pleaded that the *bond* therein set forth, contained a condition, stipulating that the award contemplated should be made by the 25th day of February, 1829; whereas, in point of fact, it was not made until the 6th of March following, as fully appeared by the same, under the hands and seals of the arbitrators. The bond itself, and its condition, together with the award, were spread out *in extenso* upon the plea, which concluded with the usual verification.

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The plaintiff demurred generally to the plea, and *Mr. George Griffin*, in support of the demurrer, insisted that the plea was bad, because it takes no notice of the *enlargement of the time* for making the award, set forth in the declaration, which was an essential ingredient in the cause of action declared upon. That the enlarged time incorporated itself into the bond,—and a plea which takes no notice of this particular, must necessarily be defective upon general demurrer. [*Evans v. Thompson*, 5 *East.* 193. *Keating v. Price*, 1 *John. Cas.* 22. *Fleming v. Gilbert*, 3 *J. R.* 528. *Hasbrouck v. Tappen*, 15 *Ib.* 200. *Jenkins v. Law*, 8 *T. R.* 87. *Brown v. Goodman*, 3 *Ib.* 592, (note.) 3 *Dow. and Ry.* 444. 2 *Barn. and Cres.* 179. *King v. Hall*, 7 *Price's R.* 636. 1 *Mau. and Sel.* 21. 1 *Esp. N. P.* 35. 5 *Bro. P. C.* 313. 8 *J. R.* 193. 2 *Chit. Plead.* 457.]

*Mr. H. Holden, contra*, for the defendant, insisted that the *declaration* was bad. That the action should not have been brought either upon the bond or the award, but on the submission implied in the new agreement for enlarging the time. The declaration states, that the time for making the award was extended, but it does not tell us how it was enlarged—whether by parol, or by writing. When the time was extended, a new agreement was formed; the old one was abandoned or merged in the new one, and an action of debt, founded upon the original bond, could not be sustained. [3 *D. and E.* 592, (n.) 9 *J. R.* 115. 2 *Wend. R.* 399.]

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OAKLEY, J. This case comes before us on a general demurrer to the defendant's plea to the first count of the declaration. That count sets forth, 1. That mutual bonds of submission to arbitration, dated the 9th of February, 1829, were executed by the parties, by which the award was to be made, on or before the *25th day of February*. 2. That before that period, the time for making the award was extended by the parties to the *6th of March*, and that it was agreed, that an award, to be made within such extended time, should be binding. 3. That an award was made within such enlarged time;—and the count then sets forth a breach of the award, on the part of the defendant, in the non-payment of the money awarded. The plea sets forth the bond and its conditions, together with the award, by which it appears that the latter was made after the expiration of the time limited for making it, in the conditions of the bond. To this plea the plaintiff demurs.

The question sought to be raised by the defendant in this case, is, whether an action of debt can be sustained on an arbitration bond, when the award is not made within the time specified in the conditions of the bond, though the parties may have extended that time by a new agreement. It seems to be settled, in such a case, [*Freeman v. Adams*, 9 J. R. 115,] that the action must be on the submission implied in the new agreement. The defendant here, however, seems to have mistaken the nature of the action, as set forth in the plaintiff's first count. It is not founded on the bond, but on the submission made by the new agreement, and on the award made in pursuance of it. The count sets forth all the circumstances,—the bond, the enlargement of the time, the agreement that the award shall be binding, and the award itself. It is strictly appropriate to the case, and the plea is clearly no answer to it. There must be judgment for the plaintiff on the demurrer.

*Judgment for the plaintiff, with leave to the defendant, &c.*

[Geo. W. Strong, Atty for the plff. Horace Holden, Atty for the deft.]

Oct. Term,  
1829.

JOHN ELTING, Jun., and JACOB SHOOK

Elting and  
Shook  
v.  
Brinkerhoff.

versus

STEPHEN J. BRINKERHOFF.

The defendant, residing in Dutchess County, drew an order, payable on demand, in favor of the plaintiffs, for 100 dollars, on one Ring, the master of a sloop, by whom he was in the habit of sending his produce to market. The order was not negotiable, nor was it presented until nearly six years after its date; and in the mean time, various settlements had taken place, between the plaintiffs and the drawee.

HELD, that if the draft were to be considered as an inland bill of exchange, the drawer was discharged by the *laches* of the holders; but if it were treated as a mere banker's check, then that a presentation for payment, at any time before suit brought, would be sufficient, unless the drawer could show injury from the delay. HELD also, that the consideration of the order, whether check or bill, could be inquired into, between the original parties; and as the defendant contended that the order was drawn for the mere accommodation of the plaintiff, the court ordered that question to be submitted to a jury.

THIS was an action of assumpsit against the defendant as the drawer of the following check or order, the plaintiffs being the payees and holders thereof.

"Capt. Ring,

"Please to pay Messrs. Elting & Shook, one hundred dollars, and oblige

STEPHEN J. BRINKERHOFF."

"June 3d, 1822."

The declaration contained a count upon the order, together with the common money counts. Plea the general issue. It appeared, at the trial, that the defendant, at the time of the drawing of the order, was an extensive farmer, residing in Dutchess County, and the drawee was the master of a sloop, who was in the habit of transporting the produce of the defendant's farm to New-York, and of disposing of it for him there. The order was not presented to Ring, the drawee, until nearly six years after its date, and payment being then refused, the plaintiffs, in May, 1828, caused it to

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be again presented, and this action immediately thereafter to be brought. Between the date of the order and the bringing of the suit, various settlements had taken place between the drawee and the plaintiffs, in some of which, the latter were found indebted to Ring, and, on one occasion, the plaintiffs gave him a promissory note for one hundred and thirty dollars; but the order in question was not considered in any of the settlements. Brinkerhoff was generally in the habit of drawing the proceeds of his produce out of the hands of Ring as fast as the latter received it, and their dealings were confined to this business. It did not appear, distinctly, whether there were funds in the hands of the drawee at the date of the order, or not, and Ring, who was examined as a witness, could not testify positively on that point, but he had at all times been solvent, down to the day of trial, and if the order had been presented in season, it would have been paid.

Upon this state of facts, the defendant insisted that the bill or order, did not upon its face import a consideration and that as the plaintiffs had not shown any, *aliumde*, they could not recover. He also insisted, that the drawer was discharged for the want of a timely demand on the drawee, and notice of non-payment.

His honor Judge Hoffman, (before whom the cause was tried,) overruled the objections, and directed the jury to find a verdict for the plaintiffs, which, having been done, the defendant now moved for a new trial.

*Mr. D. B. Tallmadge*, in support of the motion, contended, I. that the bill or order, did not import or denote a consideration. Bills or notes, he said, do not import a consideration, unless the words *value received* are used, or the true consideration is *expressed*, or the instrument made *negotiable*.

Every agreement, to be binding in law, must be on a sufficient consideration. This consideration is either *expressed* or *imported*. A *seal* denotes or imports it. So also do the words *order* or *bearer* in commercial paper.

Although a bill of exchange is not a specialty, but merely a simple contract, yet a *sufficient consideration* is *implied* from the *nature* of the instrument. The validity of the bill cannot in ge-

neral be disputed, on account of the want of a sufficient consideration, when it is in the hands of a third person.

In this respect, therefore, a bill of exchange, although it is not a specialty, yet it carries with it the same presumption of consideration, as a bond or other specialty, particularly when it is in the hands of a third person. It is not, however, owing to the form of a bill of exchange, nor to the circumstance of its being in writing, that the law gives it this effect, but in order to strengthen and facilitate the commercial intercourse, which is carried on through the medium of this species of security; for, notwithstanding a contract be in writing, it is essential, to the validity of it, that it should in all cases be founded on a sufficient consideration, unless the writing, from its being of the highest solemnity, import a consideration, or unless it be negotiable at law, and the interest of third persons are involved in its efficacy. [Chitty on Bills, 6. 13, 14. 2 Wils. 212.]

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II. If this be a valid instrument on the face of it, yet no action can be maintained by the payee against the drawer, because it is an accommodation draft or order, and without consideration in fact.

A bill or note, importing on its face to be for value received, is *prima facie* evidence of that fact between the parties to the note and third persons, whenever the bill or note is admissible as evidence. But the presumption of value received, arising from the words on the face of the bill, may be rebutted by circumstances, as if the payee should neglect entirely to present it for acceptance. [Bailey on Bills, 317. Grant v. Da Costa, 3 M. and S. 351.]

III. The demand was not made, nor the notice given in time to allow the plaintiff to recover. Bills payable at sight, and notes payable on demand, stand upon the same footing, and to charge the drawer of a bill, or the endorser of a note, the bills should be presented, or payment demanded within a reasonable time. [Aymar v. Beers, 7 Cowen's R. p. 705.]

It appears to have been formerly held, [Chitt. on Bills, 257,] that it was incumbent on the person, insisting on the want of notice, to prove, that he had really sustained damage by the laches

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of the holder; but it has been settled by later decisions, that such damage is to be presumed, and that the *only* excuse for the omission, is the proof of the want of effects in the hands of the drawee; and it is always presumed, till the contrary appears, that the drawer of a bill has effects in the drawee's hands, and consequently, that he may have sustained a loss by the neglect to give notice.

But demand and notice are necessary where the party draws the bill with a *bona fide* and reasonable expectation, that he shall have assets in the hands of the drawee, as where there are fluctuating accounts between the drawer and drawee, or where, at the time of drawing a foreign bill, the drawee has effects of the drawer in his hands, though they are taken out before the bill becomes due, or where the drawee has effects of the drawer in his hands, at any time while the bill is running, [4 Stark. 263. 3 Esp. R. 158. Chitty on Bills, 86. 256. 2 Camp. 503. 15 East. 216. 20 J. R. 146. 11 East. 117. 7 Cowen's R. 176.]

*Mr. R. C. Wheeler* and *Mr. J. Tallmadge*, *contra*, contended, I. That the draft or order, imported a sufficient consideration; and that it was evidence, under the common money counts, sufficient to support the action.

II. That demand and notice at any time, before suit brought, were sufficient, the plaintiffs having proved that the drawee had no funds of the defendant in his hands at the date of the draft; that the drawee had been at all times since the making of the draft, and was still solvent, and that the defendant had withdrawn all his funds from the hands of the drawee, leaving this order unpaid.

III. Bank checks are the same as inland bills of exchange, and may be declared on as such, or given in evidence under the money counts; and there is no difference, in principle, between checks on a bank and orders on individuals. The holder never proves the consideration of a check, note or bill; they import consideration in all cases, and even, as between the original parties, the defendant, if he disputes the consideration, must show the want of it. [3 J.

Cases 5. 259. 6 Cowen's R. 484. Stark. Pl. 4. 280. 2 Camp. R. Oct. Term,  
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OAKLEY, J. The defendant, residing in Dutchess County, drew the order in question, in favor of the plaintiffs, on Ring, the captain of a sloop, belonging to the same county, and by whom the defendant was in the habit of sending his produce to the New-York market. The order was not presented to Ring, until nearly six years after its date, and, in the mean time, various settlements of accounts had taken place between Ring and the plaintiffs, in which the plaintiffs were found indebted to Ring; and on one occasion, in a sum larger than the amount of the order for which the plaintiffs gave him their note, which still remains unpaid.

1. If the draft in question is to be considered as an inland bill of exchange, it is very clear, that the lapse of time between the drawing of the bill, and its presentation to the drawee, has been such as to discharge the defendant. Though it does not clearly appear whether the drawer had funds of the defendant, at the time of the drawing of the bill, yet he had a right to expect that his bill would be accepted and paid; and it is in evidence, that it would have been paid, on sight, if it had been presented. Under these circumstances, it was necessary for the holders of the bill, to present it for acceptance within a reasonable time, and to give due notice of its dishonor to the drawer. [Stark. on Evi. pt. 4. 263.] What is a reasonable time for the presentation of such a bill, is the facts being undisputed, a question of law; [7 Cowen's R. 705,] and it cannot be doubted, that the bill, in the present case, was not presented in a reasonable time.

2. If the draft in question, is to be considered as a mere banker's check, (and it seems to me to be nothing more, as it is not negotiable on its face,) then, a presentation of it for payment, at any time before suit brought, is sufficient, unless the drawer has been injured by the delay, [6 Cowen's R. 490. 3 J. Ca. 5. Ibid. 259;] and there is no evidence, in this case, to show, that any such injury has been sustained.

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But, whether it be an inland bill or a check, and whether, in either case a consideration is *prima facie*, imputed by its terms, it is well settled, that as between the drawer and payee, the consideration is open to inquiry. The defendant here contends, that the circumstances of the case show that the draft in question, was for the accommodation of the plaintiffs; and I am of opinion that, that fact should have been submitted to the jury. The very long delay in presenting the draft, and the repeated settlements which took place between the plaintiffs and the drawee, without any demand of payment of the draft, are facts from which the jury might well have inferred, that they had no real interest in it, and that it had been given to them, for their accommodation merely.

The Judge having directed a verdict for the plaintiffs, it ought, in my judgment, to be set aside.

*New trial granted.*

[R. C. Wheeler, Atty for the plfs. E. Curtis, Atty for the deft.]

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ELISHA SMITH *versus* WILLIAM TRACY.

Smith  
v.  
Tracy.

The plaintiff brought an action of *assumpsit* for work and labor bestowed by him as a physician, surgeon and apothecary, on the defendant's wife, and for the medicines found and applied by him in the course of his attendance as such physician. It appeared, at the trial, that the plaintiff had no license, authorizing him to practice, but was employed by the defendant to attend upon his wife, and in the course of such attendance, furnished a quantity of medicines, for the preparing of which, he had obtained a patent; and he sought, in this action, to recover a compensation for his services, as a physician, and also for his medicines. HELD, that he was not entitled to recover any part of his claim,—not even for the patent medicines furnished in the course of his attendance.

This was an action of *assumpsit*, for work and labor as a "physician, surgeon and apothecary," bestowed by the plaintiff on the defendant's wife, and for medicines found and provided by the plaintiff, and used and applied by him in the course of his attendance as such physician. It appeared in evidence, at the trial, that the plaintiff had no license, authorizing him to practise, as a physician,—but he was employed by the defendant to attend his wife, and in the course of such attendance, furnished a quantity of medicines, for the preparing of which he had obtained a patent; and he sought, in this action, to recover a compensation for his services as a physician, and also for his medicines. The recovery was resisted on the ground that the statute disabled the plaintiff from maintaining the action. The plaintiff, it appeared, was a practitioner in "*botanic medicines*," and he attended the defendant's wife, thrice every two days, from October, 1828, to April thereafter. Her complaint was a cancer, and the bill of particulars showed a list of medicines, amounting to 75 dollars, and visits to the amount of 150 dollars. No cure was effected, a regular surgeon having been called in before "the work was complete."

At the trial, Mr. Justice OAKLEY, (before whom the cause was tried,) directed the plaintiff to be nonsuited upon his own evidence, with leave to move to set the nonsuit aside, upon a case which either party had leave to turn into a bill of exceptions.

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*Mr. D. Graham*, for the plaintiff, now moved to set the nonsuit aside, and for a new trial. He contended,

I. That the plaintiff was not within the statute, and was entitled to recover for his services. But, if he were within the statute, still that the defendant, having contracted with him, with a full knowledge that he had no license, could not afterwards turn round and set up the want of a license by way of defence.

II. That the plaintiff having had a patent for the medicines, for which he claimed to recover, was at all events, entitled to a verdict for that part of his demand. [2 R. L. 233. 220, sec. 12. 20.]

*Mr. J. Anthon, contra*, for the defendant, insisted that, I. That as the plaintiff practised physic without being duly licensed, he was disqualified from collecting any demands accruing from such practice; and that the practising in botanical medicines *for profit* was equally prohibited to unlicensed persons.

II. That the exception, in the statute in favor of botanical medicines, merely relieves a party who applies them for the benefit of the sick, from the penalty of the law against practisers of physic without license, but gives no right to make a profit of such practice; and that this exemption is confined to the administering of herbs, roots or bark, the growth or product of the United States.

III. The plaintiff's *sirup*, (he said,) contains, as its essential ingredients, sarsaparilla and lignumvite, which are not of the growth of the United States; and his *wash* contains oxyd of iron, none of which are within the exception. He not only cannot recover for demands accruing in such practice, but is liable, moreover, to a penalty for so practising.

IV. The patent granted by the United States, cannot give him any rights in opposition to the statute, which being for the protection of the health of the citizen, is a valid and constitutional

act. [He cited 14 J. R. 369. 1 Wend. R. 528. 1 N. R. L. 455. 9 Wheat. R. 203.]

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OAKLEY. J. [After a statement of the facts of the case.] By the 12th sec. of the act, regulating the practice of physic and surgery, [2 R. L. 222,] it was provided, that if any person shall practice physic or surgery without a license, "he shall forever thereafter be disqualified from collecting any debt or debts, incurred by such practice, in any court of the state." By the new revised code, which was in force at the time the plaintiff rendered the services in question, [1 R. S. 455. sec. 22,] it is enacted, that every person "not authorized by law, who for any fee or reward, shall practise physic or surgery, within the state, shall be incapable of recovering by suit any debt arising from such practice." The provisions of both acts, in this respect, are similar in effect, and undoubtedly must receive the same construction.

In the case of *Timmerman v. Morrison*, [14 J. R. 370,] the Supreme Court held, that by the true construction of the former act, no person practising without a license, could recover, for services rendered or medicines furnished, as a physician or surgeon. In *Allcott v. Barber*, [1 Wendell's R. 526,] the action was for medicines furnished. The plaintiff, in that case, being an unlicensed physician, was employed to attend the defendant's daughter, and, in the course of such attendance, furnished a quantity of medicine. The Court of Common Pleas, in which the action was tried, directed the jury, that the plaintiff had a right to recover for the value of the medicine furnished; and the Supreme Court held that direction to be erroneous. The Chief Justice says, that "where the same person officiates as physician and apothecary," he comes within the decision of *Timmerman v. Morrison*; and he says, that if it were otherwise, the country would be filled with quacks and pretenders, "peddling their nostrums, and deceiving and destroying the ignorant and the credulous, the very mischief which the statute is intended to prevent." I cannot distinguish the case now before us from *Allcott v. Barber*. The plaintiff acted in the joint capacity of physician and apothecary. The

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medicines charged by him, were used and applied in the course of his attendance, and prescriptions as a physician. The case comes entirely within the principle of that decided by the Supreme Court, and must be controlled by it.

It is contended by the plaintiff, that the patent, in evidence in the case, gives him the right to sell the medicines in question, notwithstanding the provisions of the state law, and his general right to sell his medicines, as an apothecary, is not questioned in this case. The patent confers no additional right on him, but precludes others from selling or using them. The state law, by the construction given to it by the Supreme Court, prohibits him from "*padding his nostrums*" in the character of a physician, and inducing people to buy and use them, in consequence of their reliance on his pretended skill. Such practices, the law of the state has declared to be dangerous to the public health, and if the patent in question, had authorized him, in express terms, to vend his medicines in the manner in which he has done it in this case, I should have no hesitation in holding, that the patent would be inoperative against the provisions of the law. It is not necessary, however, to enter further into this view of the case.

The plaintiff also contends, that the knowledge of the defendant that the plaintiff was an unlicensed physician, is a feature in this case, which distinguishes it from those decided by the Supreme Court. I cannot so consider it. That knowledge, no doubt, existed in the case of *Allcott v. Barker*, and exists also, in the great majority of cases, in which unlicensed physicians are employed. The mischief intended to be prevented by the statute, is injury to the "*ignorant and credulous*," and the protection of the statute, to that class of people, would be in a great measure defeated, if a circumstance of such common occurrence, were permitted to take the case out of its operation. The motion to set aside the nonsuit must be denied.

*Motion denied.*

[D. Graham, jun. *Atty for the plff.* E. Anthou, *Atty for the deft.*]

*Note.—This "practitioner" professed to cure "most diseases incident to humanity," among which were enumerated gout, gravel, asthma, syphilis, stone, dropsey, ulcers, salt rheum, afflictions of the nerves, palpitation of the heart, St. Anthony's fire, tetters, scald heads, consumptions, and all diseases arising from impurity of the blood. One of his recipes for a "tincture" in the above complaints, was as follows:*

"Take one gallon of cider, half a pound of horse-reddish-root, a quarter of a pound of white-oak bark, and two ounces of oxyd of iron. Let the mixture stand six days, stirring it twice every twelve hours, and it will be fit for use."

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WILLIAM SMITH

*versus*

ENOCH WISWALL and FRANCIS PRICE.

The declaration alleged, that it was agreed between the plaintiff and the defendants, 1. That the plaintiff should subscribe for and take 80 lots of ground, in a certain tract in the city of N. Y. "agreeably to the conditions, as set forth in said articles of subscription." 2. That he should pay over, at the meeting of the said subscribers, for the division of said lots, a certain sum of money. 3. That the defendants should allow to the plaintiff, on the settlement for said lots, a certain sum as commissions, &c. It then averred a performance, on the part of the plaintiff, in the words of the agreement, as set forth, and assigned, as a breach, the nonpayment of the sum to be allowed as commissions. Upon general demurrer to this declaration, for the want of a sufficient statement of the cause of action, it was held to be sufficient, although liable, perhaps, to objections, upon special demurrer.

This case came before the court upon a general demurrer to the first count of the declaration, which set forth, that in and by a certain agreement between the plaintiff and the defendants, dated the 4th day of March, 1827, it was stipulated that the plaintiff should subscribe for, and take 80 lots of ground, on a certain tract in the city of New-York, called the Bloomingdale Tract, "agreeably to the conditions, as set forth in said articles of subscription, and to pay over, in cash, at the meeting of the said subscribers, for the

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"division of said lots, the sum of 3,200 dollars; and that the defendants should allow to the plaintiff, on the settlement for said lots, the sum of 2,800 dollars, as commissions for taking up said subscription." "And although the said plaintiff, afterwards, &c. did subscribe for and take the said 80 lots of ground on the said tract, agreeably to the conditions as set forth in said articles of subscription, and did also pay over, in cash, at the meeting of the said subscribers, for the division of said lots, the sum of 3,200 dollars," yet the defendants "wholly neglected and omitted to pay or allow the said plaintiff, on settlement of said lots, the said sum of 2,800 dollars, or any part thereof, (although often requested,) as commissions for taking up said subscription," &c.

*Mr. D. Selden*, for the defendants, in support of the demurrer, contended, that the count did not set forth the cause of action with sufficient certainty, to enable the defendants to ascertain for what they were sued. That it did not set forth the *whole contract*, but only a part of it, leaving all the conditions of subscription to be supplied by proof at the trial.

A declaration, on a special contract, (he said,) ought to contain such a statement of the cause of action, as to enable the defendants to present the rights of the parties as a question of law or fact, at his option. Here there is not enough set forth, for the exercise of any such power of election, and the declaration is decidedly defective. [9 J. R. 291. 2 Bos. and Pul. 265. 1 Day's R. 315. 1 Chitt. P. 214, 234-5, 255. 299. 300.]

*Mr. E. Barnes, contra*, for the plaintiff, contended, that as the sole objection to the declaration was for an alleged defective statement of the terms of the subscription, the defendants could not take advantage of it on a *general demurrer*. That as they had the subscription paper in their own hands, that which was apparently uncertain, might be made certain by a reference to proof in their own possession. There is no necessity, (he said,) for setting out, with more particularity, that which is in the defendants' knowledge. The terms of the agreement are known to them, and we have set out enough to enable the court to perceive what the con-

tract is,—that we have fulfilled it on our part, and that the defendants have been guilty of default on their part. A general demurrer to such a declaration cannot be supported, for it admits the contract in the terms stated in the pleading.

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*Per Curiam.* The statement of the agreement in the declaration, is sufficient on general demurrer. The plaintiff avers performance of all the stipulations on his part, (which the demurrer admits,) and the breach assigned is of a specific character, namely, the non-payment of a certain sum of money. On a special demurrer, it might have been held that the plaintiff should set forth, more particularly, the terms of the subscription; but upon the present pleadings, there must be judgment for the plaintiff.

*Judgment for the plaintiff, with leave to the defendants, &c.*

[E. Barnes, Att'y for the plff. D. Selden, Att'y for the def's.]

**JAMES BENNET versus ADINIJAH MOODY.**

An action of debt, in this court, will lie upon a judgment obtained in the Marine Court. And where the declaration alleged, that the plaintiff, "levied his certain plaint" in the Marine Court, against the defendant, for a cause of action arising within its jurisdiction, and such proceedings were had, that a judgment was obtained, &c., a demurrer to it, for want of jurisdiction, as manifested by the pleading, was held to be not well taken.

Although the first process in the Marine Court is by summons or warrant, it does not follow, from this, that such process may not be founded upon a plaint previously filed. But if otherwise, then the words, "levied his certain plaint," are to be taken as tantamount to "commenced his suit," or "impleaded the defendant;" either of which would be sufficient, *prima facie*, to show, that the court had jurisdiction over the defendant's person.

THIS was an action of debt, upon a judgment obtained by the plaintiff against the defendant in the Marine Court. The declaration alleged, that the plaintiff, on the 20th day of May, in the

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year 1829, in the Marine Court, in the city of New-York, "levied his certain plaint" against the defendant, "in a plea of trespass on the case, for a cause of action, arising within the jurisdiction of said court, and such proceedings were had," that afterwards the plaintiff, by the judgment and consideration of said court, recovered against the defendant the sum of money demanded, "whereof the defendant is convicted, as by the record," thereof fully appears.

The defendant demurred to the declaration, and *Mr. E. Barnes*, in his behalf, contended, I. That the plaintiff, having as full and ample means of obtaining a satisfaction of the judgment, in the Marine Court, by execution, at the time of the commencement of the suit, as he had at the time the judgment was obtained there, could not, for the mere purpose of accumulating costs, bring a new action thereon. [*Hale v. Angel*, 20 J. R. 342. 2 Bac. Abridg. p. 14. *A. Roll's Abridg.* 600, 601.]

II. That the declaration failed to show, that the Marine Court had jurisdiction, so as to enable it to give a valid judgment in the premises. [2 R. L. 381. 8 Cowen's R. 314. 6 Ib. 234. 3 Dall. 382. 4 Ib. 8. 5 Cranch, 173. 5 Jac. Law. Dic. 158.]

*Mr. D. Graham, contra*, contended, that the declaration contained a legal cause of action which was well pleaded. [2 R. L. 381, sec. 106. Ib. 370. sec. 88. 112. 1 Saund. 92. n. 2 Chitty P. 181, notis.]

**OAKLEY, J.** The defendant contends, that no action of debt will lie on a judgment obtained in the Marine Court. It is clearly otherwise. The case of *Hale v. Angel*, [20 J. R. 342,] shows that such an action may be maintained, even on a judgment in a Justice's Court.

It is said, however, that the declaration in this case, does not show, that the Marine Court had jurisdiction, so as to make its judgment effectual. The count states, that the plaintiff "levied his certain plaint" in said court, against the defendant, for a cause of action arising within the jurisdiction of said court, and such pro-

ceedings were thereupon had, that judgment was obtained, &c. This would clearly be sufficient, as to those counts where the action is, technically speaking, commenced *by plaint*. [1 *Saund.* 92. n. 2.] But as to the Marine Court, it is said, that no such proceeding as that by plaint is known, but that the first process is, in all cases, to be by summons or warrant. Although the statute directs, that the first process shall be a summons or warrant, it does not necessarily exclude the idea, that such first process may be founded on a plaint. The Marine Court is a court of record, and its organization will admit, for aught I can see, like other courts of record, of the practice of filing a plaint, as the foundation of the first process against the defendant.

Were this otherwise, I should be inclined to hold, that the words, "*levied his certain plaint*," are to be taken, not in their technical sense, but as equivalent to the allegation, that the plaintiff in that court had commenced his suit against the defendant, or *had impleaded the defendant*, either of which would be sufficient, *prima facie*, to show that the court, rendering the judgment, had jurisdiction of the defendant's person. The legal intendment in such a case would be, that the suit had been legally commenced. On the whole, I think, there is no foundation for the objection.

*Judgment for the plaintiffs on the demurrer.*

[D. Graham, Jun., *Atty for the plif.* E. Barnes, *Atty for the deft.*]

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Graham  
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JAMES GRAHAM versus FELIX O'NIEL.

In an action for goods sold and delivered, it appeared that the defendant introduced one Mrs. C. to the plaintiff, and directed him to let her have what goods she should at any time want, *and charge the same to him*, and he would see the plaintiff paid. Goods were delivered accordingly, from time to time, which were charged to the defendant; and Mrs. C. made various payments, which were credited in the account; but a balance having accrued, this action was brought to recover its amount. The Judge charged the jury, that if the plaintiff gave credit to Mrs. C., or if the defendant limited his responsibility to the first purchase, the verdict ought to be for the defendant. But if they believed, that the credit was given originally to the defendant, if it was unlimited in point of time, and had not been countermanded, their verdict should be for the plaintiff. The jury having found for the plaintiff, the charge of the Judge was held to be correct; that the case was not within the statute of frauds, and that the plaintiff could recover upon the common counts, for goods sold and delivered.

**ASSUMPSIT** for goods sold and delivered. The declaration contained the common counts only, and the defendant pleaded the general issue. It appeared, at the trial, that the plaintiff was a shopkeeper, and that the defendant, in September, 1823, came to the plaintiff's shop, in company with a Mrs. Connolly, (a pedler,) introduced her to him, and told the plaintiff to let her have what goods she might want, *at any time*, and charge the same to him, and he would see the plaintiff paid. Mrs. C. accordingly took up goods of the plaintiff, at the time of her introduction, and for a long time afterwards, at different periods, and made payments from time to time, on account of her purchases. The goods were entered in the books of the plaintiff to the debit of the defendant, as goods delivered to Mrs. C.; and bills of parcels were rendered in the same form to her. After this traffick had been carried on for several years in the same manner, Mrs. C. failed, leaving a balance due to the plaintiff, and to recover that balance this action was brought.

The defendant contended, first, that the case was within the statute of frauds; and secondly, that there could be no recovery except upon a special count. The Chief Justice, (before whom

the cause was tried,) reserved the questions of law, and directed the defendant to proceed with the cause.

The defendant then introduced evidence to show, that the credit given Mrs. Connolly, was limited by him to the *first* purchase; and the C. J. charged the jury, that if the credit was given to Mrs. C. or if it was limited to the first purchase, to find a verdict for the defendant. But if the credit was given originally to the defendant, and there was no limitation as to time, nor countermand of the credit, that, then, their verdict should be for the plaintiff.

The jury found a verdict for the plaintiff, and the defendant now contended, that the plaintiff was not entitled to judgment upon the questions of law.

The cause was argued by *Mr. Bogardus*, for the defendant, and by *Mr. Anthon*, for the plaintiff.

For the defendant it was contended, I. That the declaration ought to have been special, stating the agreement as made between the parties.

II. That the proof showed the case to be within the statute of frauds; that it amounted to a request, on the part of O'Niel, that the plaintiff would sell to Mrs. Connolly, and a promise on his part to see him paid for the goods. [6 *Cowen's R.* 346. 8 *J. R.* 39. 6 *Mod. Rep.* 249. 2 *Term. R.* 80.]

III. That the whole claim, except as to the credit given within one year from the sixth day of September, 1823, was clearly within the statute.

For the plaintiff it was contended, I. That upon the sale of the goods, the credit was given by the plaintiff directly to the defendant, and not to Mrs. Connolly; and that the credit was so given, and the dealings so conducted by the defendant's authority.

II. That the credit, as authorized by the defendant, was unlimited, and had never been countermanded. In pursuance of the engagement, the goods sold were charged directly to the defendant, who alone was responsible for them.

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III. That the facts presented the ordinary case of goods sold and delivered by the plaintiff to the defendant, and had nothing to do with the statute of frauds. That the common counts were all that the case required, the facts not being susceptible of, or requiring a special count.

OAKLEY, J. This was an action for goods sold and delivered. It appeared, that the defendant introduced one Mrs. Connolly to the plaintiff, and directed him to let her have what goods she should at any time want, and charge them to him, and he would see him paid. Goods were accordingly delivered to her, from time to time, and charged to the defendant. She made various payments, which were credited, and this action was brought to recover the balance.

The Judge directed the jury, that if they found that the plaintiff had given credit to Mrs. Connolly, or that the defendant had limited his responsibility to the first purchase, they should give a verdict for him; but if they believed, that the credit was given to the defendant, and with his authority, and that such authority was unlimited as to time, and had not been revoked, they ought to find for the plaintiff. The jury found their verdict for the plaintiff.

The direction of the Judge appears to me, to have been right, and the verdict of the jury is supported by the evidence. The facts present a case, not of a collateral, but an original undertaking to pay for the goods. They were furnished to Mrs. Connolly, as the agent of the defendant, and on his account, and by his express authority, and the purchase of them stands upon the same footing, as if it had been made by any member of the defendant's family, whose authority to purchase on his account, had been recognized by him. In this view of the case, the statute of frauds has no application to it, nor was there any necessity for a special count in the declaration. It is the ordinary case of goods sold and delivered to the defendant by his agent, and a recovery may be had on the general counts.

*Judgment for the plaintiff.*

[J. Hildreth, Atty for the plff. R. Bogardus, Atty for the deft.]

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JOHN T. SMITH versus JOHN J. SPIES.

Smith  
v.  
Spies.

The defendant agreed, by parol, with the plaintiff, that if he could purchase and deliver to him the notes of the New-Jersey Manufacturing and Banking Co., and pay a certain sum for discounting them, that he (the defendant) would take of the plaintiff all the notes of that Co. which he should so purchase, and pay him the amount thereof, deducting the discount. The plaintiff, under this agreement, purchased such notes from time to time, which were taken by the defendant on the stipulated terms, until finally an amount, which the plaintiff had on hand, being offered to the defendant, he neglected to pay for the same, and on that day the bank failed.

An action being brought for a breach of this contract, it was HELD, that the case presented a sufficient consideration for the agreement, and that the plaintiff had a right to recover, under it, the amount of all such notes as he had received in the regular course of his business, and in which he had a complete right of property, at the time the bank stopped payment.

ASSUMPSIT on a special contract. The declaration set forth that, in consideration that the plaintiff would purchase, procure, and deliver to the defendant the promissory notes of the New-Jersey Manufacturing and Banking Company, to such an amount as the plaintiff might be able to purchase or procure, to be discounted by the defendant for the plaintiff, and also in consideration that the plaintiff had agreed to allow the defendant a certain sum of money for discount upon said notes, at the rate of one eighth per cent. upon the amount procured and delivered, the defendant undertook and promised to receive and discount all such notes, of the said company, as should be purchased or procured by the plaintiff, and to pay him the full amount thereof in current money, deducting therefrom said discount.

It appeared in evidence, at the trial, that the defendant, (who was a money broker,) in the month of September, 1828, agreed, by parol, with the plaintiff, (who was also a broker,) to give him, in exchange for such of the notes of said company, *as he should receive in the regular course of his business*, notes of other banks, current in the city of New-York,—deducting therefrom one eighth of one per cent. on the amount exchanged, as a remuneration to the defendant for his trouble in carrying the notes received to the New-

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Jersey Company for exchange or redemption. Under this agreement, the plaintiff, from time to time, collected the notes of said company, and they were exchanged for him by the defendant, according to the stipulated terms.

On the 14th of March, 1829, the N. J. Manufacturing and Banking Company failed, and on that day the plaintiff carried to the defendant 1,599 dollars in the notes of the company, and demanded that he should redeem or exchange them. Of this sum, 89 dollars had been received by the plaintiff in the regular course of his business; 289 had been taken by him as collateral security for 200, loaned to one Patton, and the balance had been sent to the office of the plaintiff, by other brokers, on the morning of the failure of the company, that it might be exchanged by the defendant. It appeared that the plaintiff, while his arrangement with the defendant was in progress, had been in the habit of receiving the notes of said company from other brokers, for the purpose of exchanging them at the office of the defendant; but it was understood by the brokers, that the notes in question were to be returned to them if the defendant declined to exchange them.

Upon these facts, the defendant moved for a nonsuit: first, because the declaration was not supported by the proof; secondly, because the contract was void, for want of consideration and mutuality; and thirdly, because it was within the statute of frauds,—whether it was considered as an agreement for the sale of goods, or as a contract to guaranty the solvency of the bank. In this last case, it should have been in writing.

His honor, Judge Oakley, (before whom the cause was tried,) refused to nonsuit the plaintiff, and proposed to reserve the questions of law, for the consideration of the court upon a case. This being assented to by the parties, he recommended the jury to find a verdict in favor of the plaintiff for the sums received by him in the regular course of his business, and for the amount loaned to Patton, excluding therefrom the sums received by the plaintiff, from the other brokers, on the morning of the failure of the Company.

The jury returned a verdict for 283 dollars in favor of the plaintiff, including the \$200 loaned to Patten.

A case having been made by the defendant, *Mr. H. Ketcham*, in his behalf, now contended, that the plaintiff was not entitled to judgment. He insisted that there was a variance between the contract declared on, and the contract proved. [8 *Cowen's R.* 35. 7 *Ib.* 263. 18 *J. R.* 451.]

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II. That there was no consideration to support a promise, on the part of the defendant, to take from the plaintiff the bills of the company, and the defendant could only be held liable, under the contract, to pay for those bills at the stipulated rate, which he actually took. [*Cooke v. Oxley*, 3 *T. R.* 653. *Burnet v. Bisco*, 4 *John. R.* 235.]

III. That the contract proved, was not made in contemplation of the future insolvency of the company; it was not an undertaking, on the part of the defendant, to guaranty the solvency of that institution; but the small compensation of one shilling for the exchange of 100 dollars, was to be allowed him by the plaintiff, for his trouble and the expense of getting the bills of the company exchanged at Hoboken, where the bank was situated. [*Com. Dig. title AGREEMENT, (C.)* 1 *T. R.* 701. 2 *Mau. and Sel.* 363. 10 *John. R.* 412.]

IV. If, however, the contract was to be regarded as a contract to guaranty the goodness of the paper, or the solvency of the company, it was void, (he contended,) under the eleventh section of the statute of frauds, the same not being in writing. [*Saund.* 211, note 2.] If, however, it was to be considered as one for the sale of goods, wares, and merchandise, then, he contended, that it was void under the 15th section of the statute of frauds, not being in writing. That if the contract was a legal one, still, that the plaintiff was not entitled to recover under it the 200 dollars of Patton's money. [6 *Cowen's Rep.* 346.]

*Mr. S. A. Foote, contra*, for the plaintiff, insisted, that the declaration was substantially supported by the proof, and that there was no variance which could form the ground of a nonsuit.

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II. That the contract was a valid one, the bills having been taken by the plaintiff upon the faith of the agreement. That the contract was an original one. The plaintiff was not to take the notes to the bank, but the defendant was to receive them at his counter;—and there was to be no communication between the makers of the notes and the plaintiff. The defendant agreed to redeem them, in consideration of a promise, on the plaintiff's part, that he would collect them, present them to the defendant, and allow him a discount for the exchange. The contract having been executed, it is not obnoxious to the objection arising from a want of mutuality, and the plaintiff is entitled, at all events, to judgment for 83 dollars.

OAKLEY, J. The action in this case, is on a special contract, whereby the defendant agreed, that if the plaintiff would purchase and deliver to him the notes of the New-Jersey Manufacturing & Banking Company, and would pay him a certain sum for discounting said notes, that he, the defendant, would take of the plaintiff all such notes as he should so purchase, and pay him the amount thereof, deducting the discount. The plaintiff, under this agreement, purchased the said notes from time to time, and they were taken by the defendant on the stipulated terms, until finally, an amount which the plaintiff had on hand, being offered to the defendant, he did not pay for the same ; and on the same day the Bank failed.

The evidence in the case, and particularly that of the defendant's witness, substantially supported the declaration.

1. The first objection, on the part of the defendant, to the plaintiff's recovery, is, that there is no consideration for the agreement on which the action is founded. This objection ought regularly to have been presented on a motion in arrest of judgment. The agreement is set forth in the declaration, and if the consideration there stated, is not sufficient to support the defendant's promise, he might have demurred.

I think, however, that the objection is not well taken. The agreement, on the part of the defendant, was to receive the notes if the plaintiff would purchase and deliver them, and pay a certain

sum by way of discount, on them. The plaintiff acted under this agreement, and purchased the notes in question, on the faith of it, and the risk assumed, and the expenditure of money made by him in the purchase of the notes, constituted a good consideration for the defendant's engagement.

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2. It is contended, in the second place, that the defendant was not bound to guaranty the solvency of the bank, and that the bank having failed, he could not be required to take the bills. The terms of the agreement were very explicit, to take all the notes that the plaintiff should purchase; and I should consider, that by its fair construction, the notes were to be purchased at the risk of the defendant. But be that as it may, the notes in question, were presented to the defendant, before the failure of the bank, and there is no evidence to show that at the time of the purchase of them by the plaintiff, he had any reason to suppose that such failure was about to take place. There was then a complete breach of the agreement, on the part of the defendant, before the bank stopped.

3. The plaintiff has no right to recover, under this agreement, the amount of any notes, except such as he had purchased in the course of his business, and in which he had a complete right of property. Among the bills presented by him to the defendant, was a certain sum, pledged to him by one *Patten*, as security for a loan. The property in these still remains in *Patten*, and the plaintiff cannot be permitted to recover in this action for his benefit. That sum must therefore be deducted from the verdict.

*Judgment for the plaintiff for 83 dollars.*

[A. Dey, Att'y for the plff. J. Wyckoff, Att'y for the deft.]

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1839.

Higgins  
v.  
Solomon.

RICHARD HIGGINS *versus* JACOB SOLOMON.

The defendant chartered a vessel of the plaintiff for a voyage from New-York to Gibraltar, thence to Santa Cruz in the island of Teneriffe, thence to Havannah, and from thence back to New-York. In an action upon the charter-party, the declaration averred a general performance of the voyage described in it, and also a specific and particular performance, alleging that the vessel proceeded to Gibraltar and to Vera Cruz, thence to Havannah, &c.

At the trial, it appeared that the defendant put a supercargo on board the vessel, who acted as his agent during the voyage. That the vessel arrived at Santa Cruz as stated in the declaration; but instead of proceeding directly to Havannah from Vera Cruz, she first went to Orasesa, (a port on the west side of Teneriffe,) at the request of the supercargo, and for the benefit of the defendant, and from thence to Havannah.

HELD, that the declaration was supported substantially by this proof, and that there was no variance to furnish ground for a nonsuit. HELD also, that the declarations of the supercargo accompanying his acts, might be given in evidence as part of the *res gestae*, he being the agent of the defendant.

THIS was an action of covenant, upon a charter-party, bearing date the 6th of September, 1826. The defendant, it appeared, chartered of the plaintiff, as agent of the owners, the brig Emblem, (of which the plaintiff was master,) for a voyage from New-York to Gibraltar, thence to Santa Cruz, in the island of Teneriffe, thence to Havannah, in the island of Cuba, and from thence back to New-York. By the terms of the charter-party, the vessel was to receive a cargo at each of the above named ports, to be transported from one to the other in the order in which they are named, the charterer paying 3000 dollars for the use of the brig during the voyage. The vessel was to be allowed 60 lay-days for receiving and discharging her cargoes; and, if a longer time were required by the freighter, he was to pay demurrage, at the rate of twenty dollars a day for every day the vessel might be detained. Of the freight, 500 dollars were to be paid at Gibraltar, 500 at Santa Cruz, 200 at Havannah, (if required,) and the balance on the return of the vessel to New-York. It was also stipulated, that "a supercargo should have his passage free in the cabin, he finding his own provisions."

The declaration set forth the charter-party at length, and averred that the vessel received her cargo at New-York, according to the terms of the agreement ; transported, and delivered the same at Gibraltar ; received on board a second cargo for *Santa Cruz*, and delivered the same there ; received on board another cargo at Santa Cruz, delivered it at Havannah ; received on board a fourth cargo there, and returned with it to New-York. And "although the plaintiff had, at all times, since the making of said charter-party, well and truly performed, fulfilled, and kept all things in the said charter-party contained, on his part and behalf to be performed" &c. yet the defendant kept the said brig on demurrage, at New-York, for the space of six days, over and above the lay-days ; and neglected, and refused to pay the balance due upon the charter-party, amounting to 1600 dollars.

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The defendant pleaded, 1. *Non est factum*. 2. That he did not keep the vessel on demurrage at New-York. 3. That he had paid the said sum of 1600 dollars, on the 24th day of May, 1817, upon the return of the vessel to New-York. 4. That the plaintiff did not proceed with said vessel from Santa Cruz to Havannah, but, on the contrary, without any reasonable or probable cause, proceeded from Santa Cruz to another port or place in the island of Teneriffe, called Oratava, detaining the vessel there for the space of 30 days, "by reason of which deviation from the voyage in the said charter-party mentioned," the defendant was "disabled from loading or sending alongside of said brig at Havannah, a full homeward bound cargo."

The plaintiff joined issue upon the first, second and third pleas, and replied to the fourth, by protesting, that the vessel did not proceed from Santa Cruz to Oratava, and that the plaintiff did not, without reasonable cause, detain her there; and denying that the defendant was, by reason of any such delay, disabled from loading or sending alongside the said brig, a full homeward bound cargo : and this, he prayed, might be inquired of by the country:

At the trial of the cause, it appeared that the defendant put one *Pritchard* on board the vessel as a supercargo, and that he continued on board during the whole voyage. That the brig sailed from New-York on the first of October, 1826, for Gibraltar,

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and arrived there on the 4th of November; departed from Gibraltar on the 29th of the same month, and arrived at Santa Cruz on the 18th of December. The supercargo, finding it difficult to procure either freight or passengers at Santa Cruz, persuaded the plaintiff to proceed to Oratava, on the west side of Teneriffe, for the purpose of procuring them there. The vessel accordingly left Santa Cruz on the 10th of February, arrived at Oratava on the 15th, took on board there, thirty passengers, together with a quantity of brandy; departed on the 19th, and arrived at Havana on the 27th of March. The lay-days expired at Santa Cruz, and the vessel sailed from Havana on the 29th of April, with about one-half or two-thirds of a full cargo on board, and arrived at New-York on the 13th of May.

It was stipulated in the charter-party, that the freighter might have all surplus room in the cabin, for the use of passengers, by paying the master 200 dollars, over and above the amount of the freight; and it appeared by the evidence, that the plaintiff received that sum for going to Oratava. All the money paid by the passengers was received by the supercargo.

The plaintiff, for the purpose of proving that the vessel proceeded from Santa Cruz to Oratava by the direction of Pritchard, gave in evidence his declarations made at the time; and to this testimony the defendant objected. The Chief Justice, (before whom the cause was tried,) ruled, that the declarations of Pritchard, accompanied by his acts, might be given in evidence as part of the *res gestæ*. That if the defendant denied the authority under which Pritchard appeared to act, he could call him as a witness, or show his want of authority by other proof. But as he was on board during the whole voyage, *acting as supercargo*, the jury might infer, that he was the agent of the defendant, until the contrary was shown. To this opinion the counsel for the defendant excepted.

After the evidence of the part of the plaintiff was closed, the defendant moved for a nonsuit, upon the ground of a variance between the declaration and the proof; the declaration alleging a direct voyage from Santa Cruz to Havana, whereas, in point of fact, the vessel proceeded to Oratava, and was detained there a

considerable time. This motion, however, was denied, with liberty to the defendant, to move to set aside the verdict if in favor of the plaintiff.

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As there was some controversy as to the weight which ought to be attached to the testimony of one of the witnesses for the plaintiff, and also as to the amount due, (the plaintiff having exhibited his accounts,) the cause was summed up for both parties upon the evidence. The Chief Justice then charged the jury, that if the vessel proceeded to Oratava, with the assent of the supercargo, for the benefit of the charterer, that that deviation would not defeat the plaintiff's right of recovery. That the supercargo having been the agent of the defendant, would be presumed, in the absence of all proof to the contrary, to act for the benefit of his employer; and that in this case, his object seemed to be, to obtain freight and passengers, which could not be procured at Santa Cruz. That as to the effect of the deviation, the defendant had pleaded, that it had hindered him from procuring a full cargo at Havana, but he had offered no proof to support this plea.

The jury returned a verdict for 1,463 dollars in favor of the plaintiff, and the defendant, having tendered a bill of exceptions, now moved for a new trial.

The cause was argued by *Mr. D. Graham* for the defendant, and *Mr. J. Anthon* for the plaintiff.

*Mr. Graham* for the defendant.

The plaintiff has, by his own showing, broken the contract; and he cannot, therefore, recover under it. He cannot introduce a parol agreement, varying the terms of the covenant, and yet recover in this form of action. The plaintiff must recover, if at all, upon his covenant,—but his own proof shows that the stipulations of that covenant have never been performed,—and another contract, made by the supercargo, was brought forward to support a declaration, founded exclusively upon the covenant. There is, therefore, a variance between the pleading and the proof, and the action must be defeated by the plaintiff's own evidence. It might possibly be, that the plaintiff could recover upon a declaration, stating the facts as they actually occurred; but even then,

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it is doubtful, whether he could recover in covenant. If a substantial variance be introduced into the agreement by parol, the covenant is gone, and the plaintiff must recover (if he recover at all) upon the new agreement.

Here there is no proof of a breach corresponding with the issues. Pritchard had no authority to change the course of the voyage, even if he was supercargo. That was fixed by the covenant, and the master had no right to deviate from the track pointed out. Suppose an insurance upon the voyage round, and a loss at Oratava,—could the master justify the deviation, by pleading the authority or assent of Pritchard? The *iter* of the voyage was marked out by the freighter, that it might not be under the control of any one. It *could* not be changed except by him or his agent, duly authorized; and if he changed it, then there can be no recovery, except by an action on the new contract. This has been settled by repeated decisions in the Supreme Court, and recently by the case of *Langworthy v. Smith*, [2 Wend. R. p. 587. 1 Phil. Eq. 433. 8 Jona. R. 392. 491. 12 East, 583-4. 15 J. R. 200. 9 Ib. 115. 4 Cowen's R. 564.]

II. The declarations of Pritchard, as to the deviation at Teneriffe, were inadmissible.

*Mr. Anthon, contra*, for the plaintiff, maintained the following points:

I. The voyage stipulated for by the charter-party, was actually performed; and the stopping at an intermediate port, for the benefit and at the request of the defendant, did not affect the question of performance.

II. That intermediate operation having been paid for by the defendant, was entirely out of the case; and in declaring on the charter-party, the intermediate voyage being *dehors* the instrument, and actually settled for, no rule of pleading required that it should be noticed.

III. The declaration contains a general averment of performance, in the usual form, and evidence of substantial performance,

which was abundantly given in this case, fully sustained that averment. It likewise contains a special averment of performance, setting forth the voyage as performed from New-York to Gibraltar, thence to Santa Cruz, thence to Havana, and then home. To this the objection is made, that the stopping at the intermediate port of Oratava, ought to have been averred. If this objection were correct, the general averment of performance being sufficient, or the special averment unnecessary, would be surplusage: and *utile per inutile non vitiatur.*

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IV. Both the general and special averments are good, according to the rules of sound pleading, each being an averment of performance, *secundum subjectam materiem.* [Ogden v. Barker, 18 John. R. 87. White v. Parker, 12 East. 578.] The pleadings put this question to rest. The declaration sets forth the charter-party, avers performance, and assigns two breaches. I. Non-payment of six days' demurrage. II. Non-payment of balance of freight.

The defendant pleads, 1. *Non est factum*; 2. No demurrage in arrear; 3. Payment of all the freight; 4. The intermediate voyage, as a deviation, whereby the defendant was delayed, and could not procure a full cargo at Havana.

The plaintiff joins issue on the 2d and 3d pleas, and to the 4th replies, that the defendant was not hindered thereby from procuring such cargo. All these issues are found for the plaintiff, and the defendant has no ground of complaint.

V. The supercargo was the general agent of the defendant. His declarations, accompanied by his acts during his agency, were correctly received in evidence.

OAKLEY, J. This case comes before us on a bill of exceptions, by the defendant. The first objection, taken at the trial, was that the declarations and acts of Pritchard were improperly admitted in evidence.

It was clearly proved that he was sent on board the vessel, as the agent and supercargo of the defendant, and continued on

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board as such, throughout the voyage. His declarations and acts in the course of his business, as such agent, are clearly competent proof. The charter-party in question, provided that a supercargo might be put on board, and his authority, as the agent of the defendant, to detain the vessel on the voyage, "on account of cargo or otherwise," is clearly recognized in the instrument itself.

The second and principal objection was, that the proof furnished by the plaintiff, showed that the contract on his part had not been performed, and that he ought to be nonsuited on that ground. The variance alleged is, that the vessel instead of proceeding directly to Havannah, from Santa Cruz, went from the latter place to *Oratava*, in the same island, and from thence to Havannah. The objection appears to me, to admit of two answers.

1. The declaration sets out the charter-party, and avers, that the voyage had been performed. The defendant pleads *1st, non est factum*, which plea, in an action of covenant, puts in issue only the execution of the instrument, and admits all other averments. [*Kane v. Sanger*, 14 J. R. 93.] The 2d and 3d pleas of the defendant are in answer to the averments, as to the breaches assigned in the declaration. The 4th plea sets forth the fact, that the direct voyage from Santa Cruz to Havannah, was departed from, and that the vessel was detained at *Oratava*, "by means whereof the defendant was disabled from putting on board a full homeward cargo, *at Havannah*." The replication to the last plea, admits the fact of the deviation from the direct voyage, and of the detention of the vessel at *Oratava*, and tenders an issue on the last averment in the plea, which issue is joined by the defendant.

Under this state of the pleadings, it was clearly incumbent on the plaintiff to prove, 1st, the execution of the charter-party, and 2d, the breaches assigned in the declaration. The burthen of proof, upon the issue joined under the 4th plea, (if deemed a material issue,) rested on the defendant. The question of performance on the part of the plaintiff, therefore, could not arise in the case, except under the general issue, and under that plea, the defendant cannot be permitted to show any failure of performance on the part of the plaintiff. The case of *Kane v. Sanger* seems to me to establish this doctrine clearly. There the action was on the

covenant for quiet enjoyment in a deed. The declaration set forth the covenant and averred an eviction. The plea was *non est factum*, and the court held, that under that state of the pleadings, the plaintiff was not bound to offer any proof of the averments in his declaration, nor would the defendant have been permitted to question the fact of eviction, if he had not put it in issue, by a notice annexed to his plea. So, in the case now before us, the averment of performance of the voyage is admitted on the record, by the state of the pleadings, and that fact could not regularly be drawn in question at the trial. The same doctrine is also fully recognized in *Gardner v. Gardner*, [10 J. R. 47,] and in *Thomas v. Wood*, [4 Cowen's R. 185.]

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2. But if this were otherwise, I am of opinion, that the evidence in the case, supports substantially the averment of the performance of the contract on the part of the plaintiff. The voyage from *Santa Cruz* to *Havannah*, was, in fact, made. The deviation to *Oratava*, and the consequent delay in performing the direct voyage, were the acts of the agent of the defendant, who, by the terms of the charter-party, had the right to detain the vessel at pleasure. But for his interference, we have a right to presume that the plaintiff would have literally fulfilled his contract, and he is fairly to be considered as being willing and ready, at *Santa Cruz*, to proceed, and as offering to proceed, directly to *Havannah*. Upon this view of the case, it seems to fall within the principles laid down by the S. C. in *Fleming v. Gilbert*, [3 J. R. 531.] The defendant having himself prevented a literal performance by the plaintiff, shall not avail himself of a non-performance, which he has occasioned. A tender and refusal are held to be equivalent to an actual performance.

There appears to me, therefore, to be no weight in either of the exceptions taken by the defendant, and the motion for a new trial must be denied.

*Motion for a new trial denied.*

[E. Anthon, Atty for the plff. D. Graham, Jun., Atty for the deft.]

*Note.—The Chief Justice expressed a doubt whether the plaintiff was not bound to declare upon the special circumstances of the case, showing the deviation by his*

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pleading, as well as proof. But as the other two Judges were clearly of opinion that the verdict might be sustained, the Chief Justice acquiesced in their decision, and gave an opinion in accordance with it.

JOHN MOADINGER

versus

THE MECHANICS' FIRE INSURANCE COMPANY of the City of New-York.

The terms "stock in trade," when used, in a policy of insurance, in reference to the business of a mechanic, (a baker for instance,) include, not only the materials used by the mechanic, but the tools, fixtures, and implements necessary for the carrying on of his business.

The terms "false swearing," (it seems,) as used in the conditions annexed to a policy, mean an intentional and corrupt mis-statement, under oath, for the purpose of proving the existence of property not lost, or of overcharging the property destroyed, or concealing that which was saved.

It seems, also, that silver spoons, and articles of a like kind, used by a family upon ordinary occasions, are not necessarily excluded from the risk by the 8th condition, relative to plate, annexed to the policy, but may be included in the terms "household furniture." Query,—whether family portraits are excluded by the same condition as paintings, to be specified in the policy?

Where the jury adopt the plaintiff's statement, as to the loss furnished by the preliminary proofs, without sufficient evidence to support it, the court will grant a new trial, and compel the plaintiff to prove the amount of his loss.

THE defendants insured the plaintiff "one thousand dollars on his stock in trade, as a *baker*, and on household furniture, contained in a framed dwelling-house and bake-house, front and rear, situated at No. 17 Thomas-street," for one year from the 18th day of March, 1828: and this action was brought to recover the amount of a loss sustained by a fire which took place on the 12th of September following.

The cause was tried before the Chief Justice. At the trial, two questions were raised by the counsel for the defendants: one as

to the extent of the plaintiff's right of recovery, and the other as to the amount of his loss. The plaintiff contended that the words "stock in trade," covered not only the flour used by him in his bake-house, but also all the implements and fixtures belonging to his business,—such as bread troughs, benches, pans, stoves, scales and weights, sieves, knives, baskets, &c. &c. He also included in his schedule of stock, a horse, waggon and harness, used in the delivery of bread to his customers; and he called several bakers as witnesses, who testified that all the articles included in the plaintiff's schedule, were considered, by bakers, as "stock in trade."

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It appeared from the testimony, that thirty barrels of flour, included in the schedule of loss, were stored, at the time of the fire, in a *shed* leading from the bake-house to the front house, and the defendants insisted that these were not covered by the policy.

Among the items of household furniture, for the loss of which the plaintiff claimed, were included five portraits, with their frames, twelve silver table-spoons, twelve tea-spoons, and a silver sugar-tongs. These articles, the defendants contended, were excluded from the risk by the 8th condition annexed to the policy, which provides that "jewels, plate, medals, or other curiosities, paintings and sculpture, shall not be included in any insurance, unless specified in the policy."

It appeared also, that the plaintiff had duly presented his preliminary proofs of loss, but his testimony, at the trial, as to the amount of his loss, the articles destroyed, and their value, was very general and vague. Indeed, the evidence was strong to show, that the household furniture was saved; and the defendants insisted, that the plaintiff had overrated his loss, both as to the quantity of the articles destroyed, and as to their value; that he had brought himself within the provisions of the 9th condition annexed to the policy, as to "false swearing," and that there was no proof upon which the jury could rest their verdict.

The Chief Justice charged the jury, that by the terms "false swearing," as used in the conditions of the policy, was meant an attempt to defraud the company, by swearing intentionally, and

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with bad motives, to the existence of property which the insured had never lost, or by greatly overcharging that which was destroyed, or not acknowledging that which had been saved. If in this case there had been such "false swearing," he charged the jury to find a verdict for the defendants. With regard to the items of household furniture, excluded by the defendants from the loss, he remarked, that although "plate and paintings" were not covered by the policy, unless specified, yet he doubted, whether the condition could be applied to the portraits, or silver spoons specified in the plaintiff's schedule; and he charged the jury to consider them as covered by the policy, that the question might be brought before the court, by the defendants, if they should choose to do so.

With regard to the terms stock in trade, the jury were charged that those terms, when applied to a baker's property, must be intended to mean something more, than when used among merchants, from whom they were borrowed, and to whose business they were originally applicable. That the terms when used in a policy, to designate the property of a mechanic, must be taken to mean whatever was necessary for the conducting of his business, and in this case, not merely the flour used for baking.

As to the value and amount of the articles destroyed, the jury were instructed, that the plaintiff could not recover for the flour stored in the shed, nor for items, the existence, quantity and value, of which he had not established by proof, and they were charged to weigh all the evidence upon these points carefully.

The jury found a verdict for 1,013 dollars in favor of the plaintiffs, and the counsel of the defendants excepted to the charge of the Judge.

Mr. P. A. Cowdry, for the defendants, now moved for a new trial, first, upon the ground of a misdirection, and secondly, because the verdict was against evidence. Upon the first point he contended, that the terms "stock in trade" as used in the policy, did not include the fixtures and implements of the plaintiff's business, nor his wagon and harness; but covered merely the flour and bread, which were upon the premises at the time of the fire.

As to the finding of the jury, he further contended, that they must have relied entirely upon the *oath of the plaintiff* as presented by the preliminary proofs. That all the other evidence merely showed, that the plaintiff had *some* furniture, *some* fixtures, and *some* stock in trade; but the amount and value of the same was in no way shown, except by the plaintiff's own swearing. As the proof upon all these points was entirely defective, he insisted, that a new trial ought to be granted.

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Mr. J. Anthon, contra, for the defendants, contended, that the Chief Justice's construction of the policy, was entirely correct, and that there was evidence enough to warrant the finding of the jury.

Per Curiam. The terms "stock in trade" as used in the policy, are to have a more extended meaning in this case, than in their ordinary application to the business of merchants. The plaintiff was a baker, carrying on business in a limited way. On the day of the fire, his whole stock of *bread* was upon his cart, and he contends, that in order to give effect to the intention of the parties, his fixtures and implements of business, must be considered as covered by the policy. We think the policy protected every thing which was necessary for the carrying on of the plaintiff's business; and such ought to be the construction in all cases relating to the pursuits of mechanics. The construction contended for by the defendants, is altogether too narrow; and would, in many instances, entirely defeat the principal objects of insurance. The evidence shows, that the meaning given to the words by the presiding Judge, at the trial, corresponds with the understanding of persons skilled in the trade; and a mechanic who insures his stock, covers his implements of trade also. The meaning of the terms will vary, according to the business to which they are applied. The stock of a merchant comprehends articles entirely different from the stock of a farmer; but the terms in all cases, apply to *personal* property only. By giving a liberal construction to the policy under consideration, it is quite clear, that the intention of the parties will be best effectuated, and justice thereby be done. The

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charge of the Judge, at the trial, was, therefore, entirely correct,
and the grounds of exception are not well taken.

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But upon the second point raised by the defendants, we think there ought to be a new trial. The verdict is for a much larger amount than the evidence will warrant. The jury have virtually adopted the plaintiff's own statement of his loss, as the basis of their estimate, deducting therefrom the item of flour stored under the shed, which the Chief Justice properly instructed them, ought to be excluded. There is no evidence to show, that many of the items charged were upon the premises at all, at the time of the fire. The witness who assisted in making out the plaintiff's statement, knew nothing of the household furniture; and the proof is abundant to show, that such furniture as there was, was saved. The cause must be tried again, to ascertain the amount of the plaintiff's loss, and as the whole controversy will be confined to the items of the plaintiff's claim, there should be a reference of the cause, to ascertain the extent of the loss actually sustained by the plaintiff.

New trial granted.

[P. A. Cowdry, Atty for the defts.]

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GEORGE W. WALLIS

versus

THE PRESIDENT and DIRECTORS of the MANHATTAN COMPANY.

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The lunacy of a person who has executed a power of attorney, does not operate to revoke it,—at least, until the fact of his lunacy has been properly established by an inquisition.

The plaintiff having deposited in the bank of the defendants, certain sums of money, executed a general power of attorney in favor of his brother, and afterwards became lunatic. The attorney attempted to draw the money, thus deposited, out of the bank, by virtue of his power; but the defendants refused to honor his checks, in consequence of the lunacy of the principal, who was then in an asylum for mad men; but there had been no inquisition, nor proceedings in chancery, for the appointment of a committee of his estate.

HELD, that the power was not revoked by the lunacy of the plaintiff, and that the defendants were bound to pay interest on the deposits, from the commencement of the suit to the time of the judgment.

This was an action of assumpsit, brought in the name of the plaintiff, to recover of the defendants a balance of 11,259 dollars, due from them, for depositories made in their bank by the plaintiff, and for collections made by them on his account.

At the trial of the cause, it appeared that the plaintiff, at the time the action was commenced, was a lunatic, and in the asylum near New-York; that he was subject to fits of lunacy, but had, during a lucid interval, in the month of December, 1827, and while capable of understanding his own concerns, given a general power of attorney to his brother, *William Wallis*, authorizing him to transact business for him, and attend generally to his affairs. During the spring of the year 1829, after the power was given, and before the demand, hereinafter mentioned, was made of the defendants by *William Wallis*, the plaintiff became insane, and was placed by his friends in the asylum, where he remained until the 4th of September, 1829, when he was put on board a ship, which sailed for England, (his native country,) before the time of the trial, which took place in October thereafter. It fur-

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ther appeared, that on one occasion, before the power was executed, the Court of Chancery had been compelled to interfere, in some way, in relation to the plaintiff's property ; but no committee of his estate was ever appointed, nor were the facts relative to the proceedings distinctly shown. It also appeared, that the plaintiff had been insane on two several occasions after the date of the power, and before the bringing of the action.

On the second of May, 1829, when the balance in the Manhattan Bank, in favor of the plaintiff, was nearly 7000 dollars, William Wallis filled up checks on that bank, *as attorney of the plaintiff*, to the amount of 5000 dollars, and made application to the defendants to know whether the checks would be paid,—exhibiting, at the same time, his power of attorney. The cashier of the bank, knowing that the plaintiff was a lunatic, and in the asylum, and perceiving that the power was dated at a previous time, declined honoring the checks, until the counsel of the bank could be consulted. The power being left with the cashier, afterwards, on the 16th of May, William Wallis again made application at the bank, to know its decision, and was then informed that his checks would not be paid, unless the original power of attorney, from the plaintiff to him, was deposited with the defendants. This the agent refused to do, stating that the power was a general one, authorizing him to act in other matters, and that he should have occasion to use it in the state of Virginia ; but he offered to leave an authenticated copy of the original power at the bank, if that would be satisfactory. The defendants refused to accept a copy, and refused to pay the checks of the agent, if presented, and were then informed, that they would be held answerable for *interest* from that time.

It did not appear that any checks were ever actually presented, or that any other demand of the money, than that already mentioned, was made of the defendants ; but between the second of May and the first of June, the balance in the bank, in favor of the plaintiff, had been swelled, by collections on his account, to 11,259 dollars ; and after the last named period, this action was commenced. The officers of the bank made no objection to the paying of the money for the want of a regular demand, but were per-

fectly ready to honor the agent's checks, if they could do so with safety to themselves. No indemnity was offered or required, and the sole difficulty in the case, grew out of the lunacy of the plaintiff; but the defendants proved that it was their invariable usage never to pay money standing to the credit of dealers, except upon checks presented at the counter of their bank. After the foregoing facts had been made to appear by the plaintiff's witnesses, the defendants moved for a nonsuit; but the presiding Judge (Hoffman) recommended that a verdict should be taken for the plaintiff, subject to the opinion of the court upon a case, either party having leave to turn the same into a bill of exceptions. This course having been assented to by the parties, a verdict for 11,500 dollars was returned in favor of the plaintiff; it being understood that the amount due should be adjusted by the court, (if the plaintiff was entitled to recover,) so as to give or disallow interest, according as their opinion should be favorable or unfavorable to the plaintiff's claim therefor; but if the court should decide that the action could not be maintained, then a nonsuit was to be entered.

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A case having been afterwards made, *Mr. Slossen*, in behalf of the defendants, contended, that the actual lunacy of the plaintiff, known to both parties, operated as a revocation of the power previously given. He conceded, that if a lunatic, in a lucid interval, were to give a power which should be afterwards acted upon in good faith, that the rights of the parties under the power, would probably be protected. We do not contend (he said) that insanity in all cases works a revocation of a power previously given; but we insist, as the power is revocable, that where all the parties have actual notice of the situation of the lunatic, his power, as to them, is revoked. [2 *Kent's Com.* 1st Ed. 505.]

If a power of attorney be revocable, then the power of revocation must include in it the power also, of exercising the intention to continue it. The person who grants a power, is supposed to exercise, at all times, the intention of continuing it, until he manifests the contrary by an act of revocation. If a crisis shall arrive in his mind, whereby he cannot manifest a volition to continue the power, then, in contemplation of law, it is revoked. The continuance of

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the power depends upon the question, whether he who granted it, remains *disposed* to continue it. Take away the exercise of his will, deprive him of the power of volition, and he can no longer be said to continue the power granted, or wish for its duration ;—as in the case of a *feme sole*,—while she remains single, she can grant a power ; if she marry, she can no longer exercise a control over the subject of the power, and the marriage therefore operates as a revocation of it. [2 *Kent's Com.* 506. 5 *East*, 266. *Rol. Abr.* 331. *Anon. W. Jones*, 388.]

So if a will be made by a lunatic during his lunacy, the will is void. Why ? Because he has no power of exercising his volition. Every thing depends upon his control over his faculties, and when disqualified to exercise such control, the power previously granted ceases. This position does not extend beyond cases of known and established insanity, and it is not intended to embrace cases of mere phrensy from sickness, or even temporary insanity, originating in incidental causes.

The facts here, present a case for great caution, on the part of the bank. The power was dated in December, 1827, yet there was no attempt to exercise it, so far as the defendants were concerned, until May, 1829. The bank was ready to pay the money if they could do so with safety, and they will not regret the course pursued, even if the decision of the court should be against them. But the plaintiff in any event is not entitled to interest. Where money is deposited in a bank, to be drawn out whenever the proprietor of it may think proper, in order to charge the bank with interest, a demand of payment must first be made. Until that shall happen, there is no default, and interest will not be allowed until a wrong of some kind has been done to him who made the deposit. In ordinary cases, it is the duty of the debtor to seek his creditor and make payment of the debt due ; but where a bank is concerned, no such duty devolves upon its officers. The proprietor seeks his money where he placed it, and no default can happen until demand and refusal take place. [1 *Esp. Cas.* 115.]

Mr. J. J. Roosevelt, contra, for the plaintiff, contended, that there was no necessity for a specific demand of payment in this case, be-

cause the acts of the defendants were tantamount to a waiver of such demand. They did not put their refusal to pay (he said) upon the ground of a want of demand, but upon the agent's want of power. They proffered their readiness to pay whenever they could do so with safety to themselves, and when called upon to say whether they would honor the agent's checks or not, they distinctly refused to recognize his authority, unless he would deposit with them the evidence of his power to draw the checks. This evidence the agent refused to part with, for reasons which must be perfectly satisfactory to the court ; and there is no rule of law, which could compel him to give up his power. The suit itself is a sufficient demand to charge the defendants with interest, for if they wished to avoid the consequences of their neglect, they should have brought the money into court. [*United States Bank v. The Bank of Georgia*, 10 Wheat. R. 333.]

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II. The lunacy of the plaintiff was no revocation of the power. He was competent to make the power when it was granted, and his subsequent insanity could not, *per se*, revoke it. If the position contended for by the defendant's counsel, were true, there would be no safety in the authority conferred by any power of attorney.

There can be no lunacy which will revoke a power, until the fact is shown by proper proceedings out of Chancery. When a committee is appointed, the power may cease, but not before.

Per Curiam. Although the authority of an agent may be revoked by the lunacy of his principal, yet the existence of the lunacy, before it can have that effect, must be established by inquisition. There would be no safety in admitting any other evidence of a fact, which is to have an operation so extensive ; and sound policy requires us to adopt this rule. It is conceded by the counsel for the defendants, that the mere existence of lunacy, cannot *per se*, operate as a revocation of the power, because the disease being often of a temporary character, may exist, and yet be removed within any given period of time. If the mere fact of lunacy operated, like death, to revoke the power instantly,

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then any acts done under it, during the existence of the disease, would be void, even if the parties were ignorant of the principal's situation. This is certainly not the law upon the subject. The mere existence of lunacy never operates to revoke a power, until the fact is judicially established by proper proceedings in Chancery. In such a case there can be no objection to allowing the effect, which the lunacy thus proved, might have upon the power; for a committee would then be appointed to take charge of the principal's estate. Due notice would be given, and all the parties having an interest in the subject, would be apprized of the true state of facts, and thus be put upon their guard.

In this case there is no evidence to show, that any proceedings have been had, to establish the fact of lunacy before the proper tribunals, although it is said, that on a former occasion, some application (the nature of which does not distinctly appear) was made to the Court of Chancery, in relation to the plaintiff's estate. This evidence serves to show, that during the existence of the power, the plaintiff had been afflicted with this disease more than once, and had, during the same period, a lucid interval; for there could have been no other reason, why the proceedings in chancery were suspended, and finally dropped. Under every aspect of the case then, the only rule which the court can safely adopt, is to consider the power as subsisting and operative, until the fact of the plaintiff's lunacy shall be established by a proper course of legal proceedings.

In this view of the subject, it is quite clear, that the defendants were bound to honor the checks of the plaintiff's agent, and that they had no legal excuse for withholding the money deposited in their bank. It could not be necessary for the plaintiff to prove a formal demand, before the commencement of the suit, because the evidence shows, either that there had been a sufficient demand, or a waiver of it on the part of the defendants. It was proved, at the trial, that after some negotiation on the subject, the cashier of the bank finally proposed to pay the money now claimed, if the original power of attorney were deposited with the defendants; and this requisition not being complied with, the refusal to pay, was, in the end, distinctly put upon that ground.

Now it is quite clear, that the defendants had no legal right to require the deposit of the original power. Being a general power, it was the right of the attorney to retain it, and in offering to give an attested copy of it, he did all that the defendants could properly require. Having thus placed their refusal to pay on an untenable ground, the defendants cannot now set up as a defence, the want of a formal demand, which was not alleged by them at the time. They finally recognized the authority of the attorney to receive the money, and the plaintiff, upon the evidence in the case, is entitled to recover. There must, therefore, be judgment for the plaintiff, for the amount of his deposits, together with interest thereon, from the commencement of the suit.

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Judgment for the plaintiff.

[J. J. Roosevelt, Atty for the plff. W. Slosson, Atty for the deft.]

See Kent's Com. (2. edi.) vol. 2. p. 645, and the cases there cited, namely, Huddleston's case, cited in 2 Ves. 34. 1 Swanst. R. 514 n. Sayer v. Bennett, 1 Cox's Cas. 107. Waters v. Taylor, 2 Ves. & Bea. 301. Inst. 2. 12. 1. Bell's Com. Vol. 1, p. 489.

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v.
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JOSEPH SHAFFER and ASSUR ASSUR

versus

LEWIS WILCOX.

Where a party, upon an affidavit, sets forth the *facts* which he wishes to establish, under a commission to a foreign country, and shows that those facts can only be proved by persons in the employment of his antagonist, whose names are unknown to him, the court will either permit the commission to issue *generally* without the names of the witnesses, or grant a stay of proceedings until their names can be ascertained.

Mr. J. Anthon, for the defendant, moved that a commission which had been granted in this cause, to take testimony at Trieste, should issue *generally*, without the names of the witnesses to be examined, or that a stay of proceedings should be granted until the plaintiffs would disclose the names of their clerks, in Trieste, who were the witnesses to be examined. He read an affidavit of the defendant, setting forth the *facts* which he wished to prove, and showing that the clerks of the plaintiffs, at Trieste, were the only witnesses who could give the information sought, as it related to their accounts. It appeared that one of the plaintiffs resided at New-York, and the other at Trieste; and the defendant alleged, that the transactions out of which the controversy grew, took place at Trieste, and could only be proved by persons in the employment of the plaintiffs there, whose names were unknown to him.

Mr. Cutting, for the plaintiffs, resisted the application, upon the ground that the act relative to commissions, [1 R. L. 519,] requires that the *names* of the witnesses should be inserted in the commission.

Per Curiam. The act in question must have a reasonable construction. If a particular officer were to be examined, whose

name was unknown, (the Attorney General of a particular state, for instance, whose testimony might be material,) the commission might be issued generally, to take the testimony of that officer, without inserting his name.

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In this case, the defendant wishes to examine the *clerks* of the plaintiffs', at Trieste, whose names are unknown to him. He sets forth by affidavit the facts which he wishes to prove, and asks either for a general commission to take the testimony of those clerks, or for a disclosure of their names, or for a stay of proceedings, until they can be obtained from other sources. This is not a fishing commission, for the facts sought to be proved, are all disclosed. The application, on the contrary, is perfectly reasonable, and if the plaintiff, who resides here, will not disclose the names of his clerks, the defendant may either issue his commission generally, to take the testimony of the clerks at Trieste, or have a stay of proceedings until their names can be ascertained from other sources.

Motion granted.

[F. B. Cutting, *Att'y for the plf'st.* E. Anthon, *Att'y for the def't.*]

Note.—The defendant, in the first instance, moved for a commission to examine certain individuals, whose names were set forth;—but the plaintiffs showed that they were persons who were concerned in the transactions in controversy, and directly interested in the event of the suit. The court refused to allow the commission for this reason, and the defendant then made the application above described.

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THE HARLEM CANAL COMPANY

versus

MOSES B. SEIXAS.

A subscriber to the stock of an incorporated company, has, by the act of subscribing, such an interest in the stock of the company, as will furnish a sufficient consideration to support a promise on his part, to pay the amount of his subscription. And the remedy of the company for the non-payment of the instalments, duly called for, according to the terms of the subscription, is not confined to a forfeiture of the shares,—but they may maintain an action of assumpsit, upon the promise contained in the subscription, for the amount of the instalments. The subscriber, who pays the amount of his subscription, can compel the company to furnish him with a proper certificate of his stock; and where, by the terms of subscription, the first instalment was not to become payable, until a certain amount of stock was subscribed for, a call for the first instalment, was deemed tantamount to a notice to the subscriber, that the requisite amount had been taken up.

ASSUMPSIT to recover of the defendant the amount of his subscription to the capital stock of the Harlem Canal Company.

The declaration contained five counts. The first set forth the act incorporating the plaintiffs, [Vol. 7, L. N. Y. 370 c.,] for the purpose of constructing a canal in the twelfth Ward of the city of New-York, at any point between 95th and 135th streets, so as to open a water communication, across the island, between Harlem Creek and the North River. That a share in the capital stock of said company was to be fifty dollars; and that the defendant, on the 17th day of September, 1827, "for the purpose of becoming "a member of the said company, and interested in the stock "thereof, promised and agreed, to and with the plaintiffs, to take "a large number, to wit, sixteen shares of the capital stock of the "said company, and then and there subscribed for said sixteen "shares, and agreed to pay for the same at the time and in the "manner following, that is to say, that as soon as a sufficient "amount of stock should have been subscribed, to justify the com-

"mencement of the work," ten per cent. "of the amount should be paid into the hands of Henry Post, Sylvanus Miller, and William Kent, Esquires, as trustees, to be by them paid over, on account of the land and expenditures of the canal, from time to time, as the work should progress, and as the same might be required, but in such manner that the contractors" "should be constantly in advance to the company, in expenditures for land and on the canal, to the amount of at least 20,000 dollars, until the work should be finished; the balance of subscriptions, with interest, should become due as follows: viz. ten per cent. in two months, ten per cent. in four months, ten per cent. in six months, ten per cent. in eight months, and ten per cent. in ten months, *from the time the first instalments were called for;* the balance of forty per cent. when the canal should be finished."

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The declaration then averred, that "afterwards, to wit, on the 17th day of November, in the year 1827," an amount of stock, sufficient to justify the commencement of the work, to wit, 8000 shares, amounting to the sum of 400,000 dollars, having been subscribed for, the first instalment of ten per cent. was called for by the said plaintiffs, and directed to be paid on the 4th day of December, then next, into the hands of the said trustees, pursuant to the said terms of subscription, "of which the defendant afterwards, to wit, on the said 4th day of December, had notice;" by means whereof, and in pursuance of the said agreement and promise, the said defendant became liable to pay for the said shares of stock as follows: to wit, ten per cent. on the said 4th day of December, and five other instalments of ten per cent. each, with interest from the said 4th day of December, in two, four, six, eight, and ten months thereafter. And being so liable, the defendant, in consideration thereof, promised the plaintiffs to pay the said several instalments in the manner above specified. Nevertheless, the defendant, although often requested, &c., had not paid the said several instalments, or any or either of them, or any part thereof, to the said *Henry Post, Sylvanus Miller, and William Kent, or either of them, or to the plaintiffs,* but to pay the same, had refused, &c.

The second count set forth, that the defendant, "in consideration that the plaintiffs would allow him to subscribe for and take

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"other sixteen shares in the capital stock of the said company, "and to be entitled to the privileges, advantages, and emoluments "to be derived therefrom," promised and agreed to pay the plaintiffs 50 dollars for each of the said shares so subscribed for by him, at the times and in the manner specified in the terms of subscription. That the plaintiffs, at the time aforesaid, did allow the defendant "to subscribe for the said sixteen shares of stock, and to "become entitled to the privileges, advantages, and emoluments "arising therefrom, and the said defendant did then and there "subscribe for the said sixteen shares, in a certain book or paper "called a subscription book; and by that subscription," promised to pay the plaintiffs for the said shares, at the times and in the manner specified. The count then alleged, that a sufficient amount of stock having been subscribed for, to justify the commencement of the work, the first instalment was called for by the plaintiffs, and the defendant was required to pay the same to the trustees on the 4th day of December, 1827; but there was no direct averment of notice to the defendant, that an amount of stock had been subscribed for, sufficient to justify the commencement of the canal. In other particulars, the second count did not differ essentially from the first.

To these two counts, the defendant interposed separate general demurrers.

[By the 5th section of the act incorporating the Harlem Canal Company, it is provided, that "it shall be lawful for the directors "to call and demand from the stockholders respectively, all such "sums of money by them subscribed, at such times, and in such "proportion as they shall see fit, *under pain of forfeiture* of their re- "spective shares, and all previous payments made thereon, if such "payments be neglected for the space of ten days after the same "ought to have been made, and thirty days previous notice of "said call and demand shall have been given," agreeably to the provisions of the act.]

The cause was argued by *Mr. Judah* and *J. B. Tallmadge, Esq.*, for the defendant, and by *Mr. J. L. Mason* and *Mr. Anthon*, for the plaintiffs.

To the first count, it was objected, I. That it shows no consideration for the defendant's promise. [14 John. R. 238. 9 Ib. 217. 1 Caine's Cas. 86. Chit. on Bills, 70. 85. 5 Term R. 482. 7 Ib. 350.]

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II. That the plaintiffs have no remedy by suit for the recovery of money due upon subscriptions for shares of their stock. By the 5th section of the act, their power over this subject is restricted to forfeiture. If the plaintiffs have a remedy by suit, it can only be by a special action on the case, for a non-compliance with the terms of subscription. All the cases which have been decided in our courts, upon this subject, are cases relating to turnpike companies, which have the express privilege, by statute, of suing their stockholders. [1 R. L. 229.]

III. The declaration contains no averment of a compliance, on the part of the plaintiffs, with the conditions upon which the defendant's promise rested. These were all conditions precedent, and as the act incorporating the plaintiffs, is a public act, the court may take judicial notice of its requirements. 1. It does not appear that the assent of the Corporation of the city of New-York to a commencement of the work, on the part of the plaintiffs, has ever been obtained. This is made a condition precedent by the 4th section of the act. 2. It does not appear that the work was begun within the time limited by the act of incorporation, nor that it ever has been begun at all. 3. It does not appear that the contractors have been in advance, as prescribed in the agreement.

IV. There is no mutuality in the contract, and the claim of the plaintiffs cannot, therefore, be enforced. In addition to this, it does not appear that the defendant possessed the shares subscribed for, nor is there any thing in the agreement, upon which an *assumpsit* can be raised.

With regard to the second count, the same exceptions were taken, and the want of an averment of notice, was especially urged as an objection. And it was contended that these various defects were the proper subjects of general demurrer. 5 Bos.

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and *Pul.* 367. *Com. Dig. tit. Pleader, c. 73. 1 Chit. Plead.*
320. 322.]

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For the plaintiffs it was urged, I. That the interest acquired by the act of subscribing to the shares, in the stock of the company, was a sufficient consideration to uphold the defendant's promise to pay for them, and that such consideration was sufficiently expressed in the declaration. [1 *Caine's Ca.* 86, and the cases cited by the defendant. 1 *Binn. R.* 70. 8 *Mass. R.* 138. *The Bed. & Bridg. Turn. Co. v. J. Q. Adams.*] The character of the transaction, under a public act, (which fully appears on the face of the declaration,) would, for the purpose of fixing a liability on the defendant, be a sufficient consideration to support his promise. But the principle, upon which the objection as to the *consideration* rests, has already been settled, by adjudications in our own courts as well as those of other states, and it can hardly be considered as open to discussion here.

II. The remedy of the plaintiffs, is not confined to a forfeiture of the defendant's shares. The company may waive the forfeiture, and rely upon the promise, and their remedies are cumulative.

By the very terms of the subscription, money is to be paid before the work is commenced, and this objection to the remedy, would deprive the company of all power to collect the first instalments. The objection, however, is not a new one. It has come up, upon other occasions, and has been disposed of by judicial tribunals. [5 *Mass. R.* 80. *Worcester Turn. Co. v. Willard.*]

III. As to the conditions precedent, there were none by the *terms of the subscription*, except that a sufficient number of shares should be subscribed, to justify a commencement of the work, and a compliance with that condition is expressly averred.

IV. As to the other objections to the declaration, they are not the subjects of general demurrer. If the plaintiffs have neglected their

duties, and any defence to this action arise from that source, it should have been *pleaded*. [1 Chit. P. 229. Com. Dig. Plead. C. 81.] Notice to the defendant is sufficiently alleged; but if not, the want of it, is not the subject of a general demurrer.

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OAKLEY, J. [After an abstract of the pleadings.] The principal objection made to the first count of the declaration, is, that it does not set forth a sufficient consideration for the defendant's promise.

The plaintiffs being a body corporate, with power to create a stock for the purposes contemplated by the act of incorporation, had a right to open a subscription for such stock, on any terms they thought proper to prescribe, not inconsistent with the provisions of the said act. The defendant by the act of subscribing, became interested in the stock of the company, and on paying the amount of his subscription, could at any time, compel the company to give him a proper certificate for the same. It is now the doctrine of the Supreme Court, as I understand it, that the interest thus acquired by the subscription, is a good consideration to support the promise to pay, and that an action may be maintained on such subscription, though the corporation may possess the power of forfeiting the stock for default of payment. [Goshen Turnpike v. Hurtin, 9 J. R. 217. The Dutchess Cotton Manufactory v. Davis, 14 J. R. 238.]

The averments in the declaration, seem to me, to bring the present case within this principle. They are somewhat informal, but they set forth the agreement of the defendant to take the stock, and the fact of his subscribing for it. His interest in the company is thereby shown, and that will support his promise to pay the instalments, according to the terms of the subscription.

The second count of the declaration sets forth the consideration of the defendant's promise, in a formal manner, and is clearly within the principles of the cases above referred to. It is objected, however, to this count, that notice to the defendant is not averred, that an amount of stock had been subscribed for, sufficient to justify the commencement of the canal. By the terms

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of the subscription, the first instalment did not become payable until such an amount of stock was subscribed, and the other instalments were to become due at stated periods, after the first should be called for. It is averred, that such a call was made, and that the defendant was required to pay, &c. If any notice of the amount of the stock subscribed was necessary, I am inclined to think, that the call for the first instalment was a sufficient notice. That call could be made, only on the event of the subscription of the requisite amount of stock, and the defendant having notice of the call, was thereby necessarily apprized of the fact, of a sufficient subscription having been made. The demurrer must be overruled.

*Judgment for the plaintiffs on the demurrer,
with leave to the defendant. &c.*

[J. L. Mason, Atty for the piffs. Judah, Atty for the def't.]

THE HARLEM CANAL COMPANY versus JOSEPH C. SPEAR.

THE declaration in this case, was exactly like that in the preceding case against Seixas. The fifth count was a general one, stating that the defendant was indebted to the plaintiffs in the sum of 1600 dollars, "for moneys due, payable, and owing," from the defendant to the plaintiffs, "for and respect of divers, to wit, sixteen shares of the capital stock of the Harkom Canal Co., of which the "defendant was proprietor," "by virtue of divers calls made by the directors of said company," for the same.

To the first, second and fifth counts, the defendant demurred specially, and pleaded the general issue to the third and fourth. The third count was substantially like the second, but more spe-

cific in its averments, and the fourth was a general one, for sixteen shares of stock *sold and delivered* to the defendant. The causes of demurrer assigned to the first count, were, 1. the want of consideration ; 2. that it did not appear from the count, what instrument, if any, the defendant subscribed, nor how, nor with whom he agreed to pay for the shares therein mentioned ; 3. that there was no averment, that the work was ever commenced, nor does it appear, that the payment of the first instalment was requisite ; 4. It does not appear, that the contractors were ever in advance to the company, in expenditures for the objects mentioned, to the amount of 20,000 dollars, or any other sum ; nor does it appear to whom the five instalments were to be paid. 5. No assumption or promise, is laid in the count, to pay the first instalment nor the subsequent ones to the *plaintiffs*, nor does it appear that any delivery or tender of a certificate of stock was ever made to the defendant, nor that he was in fact a stockholder. 6. It does not appear how, nor by whom the first instalment was called for, nor what notice the defendant had of such a call, nor that he was ever informed that a sufficient amount of stock had been subscribed for, to justify the commencement of the work.

To the second count it was objected, (in addition to the exceptions taken to the first count,) that in one part of the count it is alleged, that the defendant had promised to pay the first instalment to the *plaintiffs*, and in another part, that the same was to be paid to Post, Miller & Kent, as trustees, and that the defendant was required to pay the same to them accordingly.

To the fifth count it was objected, that it was defective for uncertainty, and that it did not show how, nor by virtue of what undertaking the defendant was indebted to the plaintiffs ; nor the amount or nominal value of a share of the stock, nor the defendant's engagement in relation to the same. 2. That it did not appear that the defendant had ever subscribed for such stock, nor how he became a proprietor thereof, nor how the money was due and payable, nor at what time, nor upon whom the calls for payment were made, nor the nature thereof, nor the time when the money demanded became due and payable under the calls.

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The Harker^m
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The cause was argued by *Mr. J. Greenwood* for the defendant, and *Mr. Anthon* for the plaintiffs.

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Mr. Greenwood contended, that the three counts were bad, both upon general and special demurrer, and in support of the additional objection to the second count, he cited, [5 Mass. R. p. 80. 1. Chit. p. 299.] He also commented, at length, upon the points assumed by the causes of demurrer, and upon the cases cited for the plaintiffs.

Mr. Anthon, contra, maintained his original propositions, and contended, that the *contract* being made with the *plaintiffs*, the payment was to be made to the trustees, as their agents merely, and that the action was well brought in the name of the company. In relation to the fifth count, he cited, 2 Chit. Plead. 53.

Per Curiam. The two first counts of the declaration in this case, are like those in the previous one against Seixas, and the demurrs to them must be overruled, for the reasons there given. The defendant has not made his objections stronger, by assigning special causes of demurrer; for his exceptions, if valid, would go to the foundation of the action. They assume, that all the matters of duty charged upon the plaintiffs, are conditions precedent to their right of recovery, and that the declaration should contain averments of a performance of those conditions. We do not think so. As soon as a sufficient amount of stock was subscribed, to justify the plaintiffs in the commencement of the work, the defendant became subject to the call for instalments, and having disobeyed that call, he is liable, in *assump^tit*, for their amount. The remedy given to the plaintiffs, is not confined to a forfeiture of the stock; it is cumulative, and the plaintiffs may resort to both remedies, if necessary.

As to the fifth count, the objections to it cannot be sustained. It avers, that the defendant being indebted to the plaintiffs in the sum of 1600 dollars, for moneys due and owing from him to the plaintiffs, for sixteen shares of the stock of that company, which were

held by the defendant, in consideration thereof, promised to pay the same, when he should be afterwards requested. Here is, no doubt, a valid consideration set forth for the defendant's promise. It arises from the indebtedness of the defendant, for the stock actually held by him. It was not necessary to set forth the manner in which he became the proprietor of the stock. If he owed the money to the plaintiffs and promised to pay it, he is, no doubt, liable. It will be the proper occasion, on the trial of the cause, to inquire, whether the count under consideration, must not be supported by proof of an actual promise. But upon demurrer, an actual promise, if necessary, may be inferred, for the purpose of supporting that laid in the declaration; and upon the trial, a promise alleged, in general terms, may be supported by proof of an express promise. The demurrer, therefore, must be overruled.

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*Judgment for the plaintiffs on the demurrer,
with leave to the defendants, &c.*

[J. L. Mason, Atty for the plffs. J. Greenwood, Atty for the deft.]

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Garretson
v.
Hemstead and
Douglass.

H. V. GARRETSON

versus

BENJAMIN HEMSTEAD AND E. DOUGLASS.

WHEREAN order has been granted for a stay of proceedings, after a trial, in order to enable the defendant, against whom a verdict has been obtained, to make a case upon a bill of exceptions, a Judge, at chambers, may, upon cause shown, so far modify the order, as to enable the plaintiff to perfect his judgment and issue his execution, without a levy, that the same may stand as security.

In this case, the plaintiff having obtained a verdict against the defendant upon the trial of the cause, an order was granted at chambers, by Mr. Justice Hoffman, staying all proceedings for 14 days, in order to enable the plaintiff to make a case upon a bill of exceptions. Afterwards, upon the application of the plaintiff's attorney, showing that there was a necessity for perfecting the judgment, that it might stand as security for the final result of the cause, the Judge so far modified the order, as to enable the plaintiff to perfect his judgment and issue an execution, *without* any authority, however, for levying the same.

Mr. J. Anthon, for the defendants, now moved to set aside the modification of the order, that the plaintiff might thus be prohibited from perfecting his judgment.

The motion was opposed by *Mr. Hawes*, for the plaintiff, and denied by the court.

[W. P. Hawes, *Att'y for the plff.* E. Anthon, *Att'y for the deft.*]

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surance Co.
v.
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THE UTICA INS. CO. versus GEORGE PARDOW.

The plaintiffs loaned to J. L. 500 dollars, upon his check for the same sum, collaterally secured by the deposit of a promissory note, endorsed by the defendant. The sum advanced to L. consisted of small checks, drawn by the plaintiffs on the Tradesmen's Bank, having the general appearance of bank notes, and being intended to circulate as such. They were not redeemed at the bank on which they were drawn, but by the plaintiffs themselves at their own office. L. having failed to repay the loan, the plaintiffs brought an action on the note, to which the endorsers set up the illegality of the transaction, under the restraining act, as a defense. Held, that the giving of the checks under the circumstances of the case, was not a banking transaction, nor against the restraining act, and that the plaintiffs were entitled to recover.

ASSUMPSIT upon a promissory note for 500 dollars, bearing date the 31st of March, 1828, drawn by one John F. Gannon, in favor of Joseph D. Palmer, and endorsed by him and the defendant.

The cause was tried before the Chief Justice ; and, at the trial, the plaintiffs proved by one Totten that the note in question came into their possession about three weeks before its maturity, having been deposited with them by James Lynch as collateral security for check of the like amount, drawn by him on the Manhattan Company. That the plaintiffs advanced to Lynch 500 dollars upon said check and note, *in their own checks*, on the Tradesmen's Bank. These checks, the witness also testified, were drawn for such amounts as are usual in the ordinary emissions of bank notes ; they were printed on bank note paper, had the general appearance of bank notes, and were intended to pass, and usually did pass as such. At the time of the loan to Lynch, and for some months previously thereto, these checks were not redeemed at the Tradesmen's Bank, (from which the plaintiffs had withdrawn their funds,) although payable there, but were redeemed by the plaintiffs themselves, on presentment at their own office in Wall-street, according to a notice for that purpose given to the public.

Lynch being called as a witness for the defendant, testified, that the note in question, was given in renewal of a previous one discount-

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ed by himself out of his private funds, and that the plaintiffs originally had no interest in it. It appeared also, by his testimony, and that of Totten, that the plaintiffs had been in the habit of employing Gannon to circulate their checks, that it was not their custom to discount notes, but they often loaned money on collateral security, and usually paid their losses in checks bearing a general resemblance to bank notes. At the time this note was discounted, Lynch was President of the Utica Insurance Company, and there was some evidence (found chiefly in the testimony of Gannon) from which an inference might be drawn that the note was discounted for the plaintiffs.

The Chief Justice charged the jury, that if the original note was discounted by the plaintiffs, or if the advance to Lynch was in fact a discount for him, then, that their verdict should be for the defendant; but that, if Lynch himself discounted the original note, and afterwards borrowed 500 dollars of the plaintiffs, and deposited the note as mere collateral security for his own debt,—then, that their verdict ought to be for the plaintiffs.

The counsel for the defendants contended, that the facts of the case disclosed an exercise on the part of the plaintiffs of *banking powers*, and that they could not, therefore, recover on the present note. But the Chief Justice, without expressing any decided opinion upon any of the questions of law, declined charging the jury to this effect, and the counsel for the defendant took exceptions to his opinion and charge.

The jury having found a verdict for the plaintiffs, the defendant now moved for a new trial.

Mr. C. O'Connor, for the defendant, contended, that the loan to Lynch, on the security of his check and the note, was a banking operation. That the contrivance of issuing "checks" upon a bank in which the plaintiffs had no funds, was a palpable evasion of the statute. The Chief Justice, (he said,) treated this case upon the trial, as if there was but one proceeding by which the restraining act could be violated, and that is by a discount. The statute, in enumerating the prohibited operations places "issuing notes" in the fore ground. [2 N. Y. R. L. p. 234. sec. 2.]

There was no dispute about the facts. They came out from the plaintiffs' own witnesses, and the Chief Justice should have charged the jury that the loan to Lynch, on his check and this note, was a banking operation, in violation of the restraining act.

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II. The discount made by Lynch, for Gannon, being made with the *notes* of the company, Lynch being at the time President of it, if not strictly and directly a company operation, was indirectly so. It was connected with their unlawful trade of issuing prohibited checks. It was one of the modes by which their officers got their checks into circulation, and was so clearly an act in furtherance of their views in the issuing of the checks, that justice must be blind if she cannot see through the veil. The restraining act was violated by the loan to Lynch from the company, and also in the loan by Lynch to Gannon.

Mr. J. L. Graham, contra, for the plaintiff. The jury having decided that the original note was discounted by Lynch, and not by the plaintiffs, and that the transaction by which he passed the note in question to the plaintiffs, did not amount to a discount of it, it is difficult to see what question remains.

It is said by the defendant's counsel, that the Chief Justice ought to have charged the jury that the loan to Lynch on his check, and this note was a banking operation. From this remark, it would seem that he has not adverted to the case of this company against Kipp, [8 *Cowen's R.* 20,] and against Scott, [8 *Cowen's R.* 717,] where it is settled that the plaintiffs have a right to lend money on personal security; nor to the case against Hewitt, [1 *Wendall's R.* 56,] where it was distinctly stated in the plea, that the plaintiffs were engaged in banking business, and that the note declared upon was created with intent to have it discounted by the plaintiffs, and that the plaintiffs, with a knowledge of that fact, did discount it in the usual course of their banking operations.

If the defendant in this cause, had proved, (which by the by he did not,) that the plaintiffs were engaged in banking business, still, as they had a right to lend them money on a personal security,

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the only hope he could have of a verdict, was to show that the note was not taken on a loan but on a strict bank discount, and this question the Chief Justice put to the jury, though there was scarcely evidence enough on the part of the defendant to warrant the raising of it.

It is probably unnecessary to allude to the charge requested by the defendant's counsel, and delivered by the court, and the question reserved upon it—for if this note was not taken by the plaintiffs by the way of a discount, then it was rightfully taken by them, unless indeed giving three checks, having the appearance of bank notes, instead of one for a sum of money, makes a man a banker.

Per Curiam. This was an action on a promissory note, dated March 31st, 1828, drawn by one Gannon, and endorsed by the defendant. The defence relied upon is, that the note in question was discounted by the plaintiffs, in violation of the provisions of the act restraining private banking associations, and is therefore void. According to the testimony of Lynch, the note in question was a renewal of a former note, which was discounted by him out of his private funds, the plaintiffs having no interest, directly or indirectly, in the original discount of it. It also appeared that the note in question, shortly before it fell due, was deposited with the plaintiffs by Lynch, as collateral security for the payment of a check, drawn by him on the Manhattan Bank, dated the 22d of May, 1828. The amount of the check was advanced to Lynch, by the plaintiffs, in their own checks on the Tradesmen's Bank. The Judge charged the jury, that if the advance of the money to Lynch, was a loan on the deposit of the note as a pledge or collateral security, the plaintiffs had a right to recover; but if it was a discount of the note by the plaintiffs, the action could not be sustained, and he submitted that question to them, on the testimony of Lynch, and the other proofs in the case. The jury found for the plaintiffs.

The charge of the Judge was in conformity to the decision in the case of the same *plaintiffs v. Scott.* [8 Cowen's R. 717.] The

Court of Errors there held, that the company was authorized by its charter, to loan money upon notes or bonds; and Lynch's statement of the transaction (which was adopted by the jury) shows, that in the present case, there was no discounting of the note in the ordinary way of banking, but a mere loan on the deposit of the note, which had been previously discounted, with his private funds.

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It is, however, insisted by the defendant, that the advance made by the plaintiffs to Lynch, in their own checks, under the circumstances, was an exercise of banking privileges. The checks in question, were printed on bank note paper, were drawn for small sums, as is usual with bank notes, had the appearance of bank notes, and were issued by the plaintiffs for the purpose of passing, and usually did pass as such. It appears also, that the checks in question, though made payable at the Tradesmen's Bank, were not paid there, but at the office of the plaintiffs, and that the plaintiffs had no funds at the Tradesmen's Bank. The statute [2 R. L. 234,] makes void all notes or securities given to any company, which, without authority of law, shall issue notes, receive deposits, make discounts, or transact any other business, which incorporated banks may or do transact, by virtue of their corporate powers. It has been decided, that the Utica Insurance Co. has no right, by its charter to carry on banking business, and with the exception of the power of loaning money by way of investment of its capital, it falls within the restrictions of the act. The question then is, whether the issuing of these checks, is, in truth, an issuing of notes, within the fair construction of the restraining act. That act must be construed strictly, where it is to work a forfeiture, although the objects of the legislature, so far as they are disclosed, are to be carried into effect. The transaction in this case, cannot fairly be considered as a carrying on of banking business. The plaintiffs made no discount of paper, but merely a loan to Lynch; and the money was to be obtained by a presentment of their checks, the amount of which they were bound to pay. It does not appear, that they gained any thing by the transaction, either interest, or any other benefit. It would be too strict, to declare their security for the

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loan as utterly void ; and, after some hesitation, we have come to the conclusion, that the plaintiffs are entitled to recover.

M'Keon
v.
Lane.

Motion for a new trial denied.

[J. L. Graham, Atty for the plf. C. O'Connor, Atty for the deft.]

HUGH M'KEON versus DAVID LANE.

A petition for a discovery, under the provisions of the revised statutes, (vol. 2, p. 199,) must present a proper case for the equitable interposition of the court, or it will be denied. And where the petitioner can have all the relief the nature of his case requires, by pursuing the ordinary practice of the courts of law, the power of compelling a discovery, conferred by the statute, will not be exercised.

THIS was a petition for a discovery, under the provisions of the revised statutes. The plaintiff brought an action of debt against the defendant, to recover of him the penalty of fifty dollars, [1 R. L. 524, sec. 20,] for not appearing as a witness in a certain cause, wherein M'Keon was plaintiff, and one Caherty was defendant. It appeared by the petition of the plaintiff, (which was verified by affidavit,) that the *original subpoena* was served upon the defendant, instead of a copy ; that the defendant received the original, retained it in his possession, and that the plaintiff had no copy in his possession, or under his control. He, therefore, prayed for an order to compel the defendant to deliver to him a sworn copy of the original, or to deposit it in the office of the clerk of this court, that he might take a copy, to be used as evidence at the trial of the cause.

Mr. J. R. Whiting, for the defendant, contended, that he was not bound to answer, or make any discovery, which might subject him to a penalty. [He cited, 1 Pet. Rep. 100. 104. Bishop v.

*Bishop, Tothill's R. 17. M. 1638. Cary v. Mildmay, Ib. 7. Dec. Term, 1639.
Bridg. Eq. Dig. tit. Discovery, vol. 1. p. 217.]*

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Mr. D. Graham, contra, for the plaintiff, relied upon the statute. [2 R. S. 199. 281. He cited also, the 28th rule of the Supreme Court. 2 Arch. Prac. 196. 3 Anstr. 634.]

Per Curiam. The statute upon which the plaintiff has brought his action, can hardly be considered as a penal one. If it were, this court, following the practice and adopting the principles of the Courts of Equity, would refuse to grant the prayer of the petition. But the act in question is to be viewed, rather as a remedial act, and we may grant the relief sought, if the petitioner has presented a proper case for our interposition. The courts of law are not compelled, by the provisions of the revised statutes, to grant relief upon all occasions, but they are clothed with a discretion, to be exercised according to circumstances.

In this case, the plaintiff can have all the relief he requires, by pursuing the usual practice. He may give the defendant notice to produce the subpoena at the trial, and if he refuse to do so, the plaintiff can then give secondary evidence of its contents. The prayer of this petition must, therefore, be denied ; but we deny it without costs, and wish it to be understood, that witnesses, who disobey the process of subpoena, must abide the consequences of their disobedience, and will not meet with any particular favor from the court.

Prayer of the petition denied, without costs.

{D. Graham, Jun., Atty for the plff. J. R. Whiting, Atty for the defl.}

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JAS. K. HAMILTON, Administrator of OLIVER G. KANE, deceased,
versus
WILLIAM T. M'COUN.

One M'Kibben, having a claim upon a Fire Insurance Company for a loss, put his policy into the hands of the defendant (an attorney and counsel of the court) for collection,—and the defendant gave him a certificate that the policy was in his possession for that purpose. Upon this certificate M'Kibben made an endorsement, authorizing the defendant to hold the policy subject to the order of Kane, and delivered the same to him.

The defendant then commenced a suit on the policy, recovered and received the sum of 1400 dollars thereon, and the intestate gave him a written notice of his claims upon M'K., which appeared to be, chiefly, for certain notes drawn by him and endorsed by one Hill.

The defendant, not deeming it prudent to pay over the money thus received to the administrator of Kane, an action was brought against him by the administrator, to recover the amount collected on the policy.

At the trial, the plaintiff did not produce the notes, and the Judge, holding that there could be no recovery until the notes were produced or accounted for, nonsuited the plaintiff. Held, that the order made by M'Kibben, with the notice to the defendant of the intestate's claim under that order, created an equitable assignment of M'K.'s cause of action, and that he had a right, *prima facie*, to receive the fund without producing the notes. The nonsuit was therefore set aside.

Assumpsit for money had and received by the defendant, belonging to the estate of the intestate. It appeared at the trial, that the intestate had held previously to his decease, certain notes of one M'Kibben, amounting to 1475 dollars, which he had paid for M'K.'s benefit; but what had become of the notes, at the time of the intestate's death, did not distinctly appear.

M'Kibben had placed in the hands of the defendant, an attorney and counsel of the court, a policy of insurance for collection, and received of him a certificate in the following words:—"I "have taken proofs of Mr. M'Kibben's loss by the late fire, No. "132 Bowery, and have certified to the Brooklyn Fire Insurance "Company, the amount of his loss to be on stock 3000 dollars, "and on furniture 300 dollars, and this I believe to be correct "from the proofs produced before me. The policy remains in

"my hands to await the answer of the company. (Signed) Wm.
"T. M'Coun, Feb. 14, 1827."

Upon this certificate M'Kibben made the following endorsement:—Wm. T. M'Coun, Esq.—Sir, I hereby authorize you to hold the policy of insurance expressed in the annexed note, received from you, subject to the order of Oliver G. Kane, Esq., New-York, 15th Feb., 1827. (Signed) Hugh M'Kibben.

The certificate, thus endorsed, was delivered by him to Kane, and the defendant having commenced a suit on the policy, recovered a judgment, the net proceeds of which, amounted to 1400 dollars.

In the month of June, 1827, Kane gave to the defendant a special written notice and statement of his claim against M'Kibben, amounting in the whole to 1475 dollars.

At the trial of the cause these facts were proved, but the plaintiff did not produce the notes against M'Kibben, which laid the foundation of the claim of the intestate against him. The defendant therefore contended, that no recovery could be had, unless the notes were produced, or a satisfactory reason for their non-production was shown, or until further proof was offered as to the debt due from M'Kibben to Kane. The defendant was ready to pay over the money to the person who had the rightful claim to it, but did not wish to assume the responsibility of paying it over to the plaintiff upon this evidence.

The presiding Judge (Hoffman) being of opinion that the notes should be produced, or their non-production accounted for, before the plaintiff could recover, nonsuited him, and a motion was now made to set the nonsuit aside.

Mr. Anthon, for the plaintiff, insisted, I. That the order on the defendant was a transfer of the policy of insurance to the intestate, and that after notice of such order, the defendant became the agent of the intestate, and finally received the money for his use. The intestate, he contended, in a controversy with such an agent, was not bound to prove the amount of his debt, but had a right to receive the whole sum, being liable to account to the drawer only.

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II. That the plaintiff could only be required to prove, in this suit, to sustain the action, that there was a subsisting debt. That the *quantum* was entirely unimportant as between these contending parties, and enough was proved on that head for the purposes of this action. Even if the transfer had been entirely gratuitous, the defendant (he said) had no right to question it. The Judge therefore, instead of nonsuiting the plaintiff, ought to have directed a verdict for the amount in the defendant's hands. [Peyton v. Hallet, 1 Caine's Rep. 363. 3 John. R. 71.]

Mr. Staples, contra, for the defendant, contended, that the order did not indicate that any debt was due from M'Kibben to Kane. It was a bare authority, he said, constituting the latter the agent of the former, and this power was subject to revocation at any time. Kane limited his own claim to 1475 dollars, in his notice, whereas M'Kibben's loss, as indicated by the certificate, exceeded three thousand dollars. It was quite evident, therefore, that the whole amount of the loss was not transferred to Kane, and the evidence did not show that the power was coupled with an interest.

II. The plaintiff was bound to produce the notes or account for their non-production. They were in the hands of the intestate, who, at most, could only have received the order as collateral security for the notes. If this money be paid to the plaintiff, what means will M'Kibben have of resisting the payment of the notes, in a suit upon them? The defendant is the agent of M'Kibben for the purpose of defending his rights, and the money ought not to be drawn out of the defendant's hands upon this evidence.

OAKLEY, J. One M'Kibben, having a policy of insurance, made by the Brooklyn Fire Insurance Company, and a loss having taken place, lodged it in the hands of the defendant, an attorney, for collection. On the 14th of February, 1827, the defendant gave a written certificate that the policy remained in his hands, and on the next day M'Kibben endorsed, on the certificate, an instrument, by which the defendant was directed to hold the

policy, subject to the order of *Kane*. On the 4th of June, 1827, *Kane* made a written statement of his claim against *M'Kibben*, which appeared to be, among other things, for the amount of certain notes drawn by him, and endorsed by one *Hill*. A suit was commenced by the defendant on the policy, and in February, 1829, he received the sum of \$1400 as the proceeds of it. The defendant was duly notified of the order made by *M'Kibben* in favor of *Kane*, and of the claims of the latter. This action is now brought by the representative of *Kane*, to recover the money thus collected by the defendant on the policy.

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The Judge, at the trial, held, that the plaintiff could not recover unless he produced or accounted for the non-production of the notes, specified in the statement of the claim of his intestate, and nonsuited him on that ground. A motion is now made to set this nonsuit aside. It seems to me, that the order made by *M'Kibben*, with the notice to the defendant of the claim of *Kane*, under that order, created an equitable assignment of the right of action of *M'Kibben* against the Insurance Company. *Kane* became thereby entitled to the fund, to arise from the action on the policy, as a security for his claim against *M'Kibben*. The defendant, from the time he had notice of that order, became, in the prosecution of the suit, the attorney of *Kane*, and when he received the avails of it, he received them for the use of *Kane*. Such appears to be the plain import and meaning of the whole transaction, and such is its legal effect, according to the principles of adjudged cases. [*Peyton v. Hallet*. 1 *Caine's R.* 379. *McMenomy v. Ferres* 3. *J. R.* 83.]

It was intimated, on the argument, that the claims of *Kane* against *M'Kibben*, had been satisfied by the latter. If that fact should appear on a future trial, and it should also appear that the defence in this case, is made at the request and for the benefit of *M'Kibben*, it may probably be effectual, as it will then be shown that the plaintiff has no equitable right to the money as against *M'Kibben*. But as the case now stands, the defendant having collected the money as the agent or attorney of *Kane*, cannot question his right to recover it, on the ground that a third

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person who, for any thing that appears, is a stranger to the suit, may have a better claim to it.

Nonsuit set aside.

[F. B. Cutting, Atty for the plf. E. Anthon, Atty for the deft.]

JAS. K. HAMILTON, administrator of Oliver G. KANE, deceased,
versus
PALMER CANFIELD.

The defendant sold a ticket to the intestate, in a lottery unauthorized by the laws of this state, which drew a prize of 50,000 dollars. The defendant caused the prize to be discounted for the intestate, who, upon the close of the transaction, permitted him to retain 10,000 dollars by way of loan, for which the defendant gave his own promissory notes to the intestate. An action for money had and received, being brought to recover the amount thus retained, the defendant set up the illegality of the transaction, under the lottery act, as a defence. HELD, that the loan of the money formed a good consideration for the assumption, and that the illegality of the original acts of the intestate and the defendant, in the purchase and sale of the ticket, could not be introduced as a defence to the action.

ASSUMPTION for money had and received. Plea, the general issue. It appeared from the testimony, introduced on the part of the plaintiff, at the trial of the cause, that the defendant sold to the intestate, during his lifetime, a ticket in the "Washington Canal Lottery"—a lottery established for the benefit of a company in the district of Columbia. This ticket having drawn a prize of 50,000 dollars, on the 27th of December, 1826, the defendant procured it to be discounted by Yates & M'Intyre, the managers of the lottery, on the 5th of January, following, for Kane; and afterwards, having come to a settlement with him, on the 8th of the same month, in relation to the prize, and the amount received for it, Kane permitted the defendant to retain out of the

proceeds of the prize, the sum of 10,000 dollars, as a favor, by way of loan, and for this amount the defendant gave three several notes to the intestate.

These notes were produced at the trial, and the defendant admitted that they had never been paid; but contended that the whole transaction was illegal. That the money received of Kane, related to the sale of a ticket in a lottery unauthorized by law, and that the plaintiff could not therefore recover.

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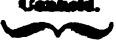
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The Chief Justice, (before whom the cause was tried,) charged the jury, that if the transaction between Kane and the defendant was a mere sale of the ticket, the defendant would be entitled to a verdict; but if it was a payment of the prize, then, that the money borrowed of Kane, after the proceeds of the ticket had passed into his hands, formed a sufficient foundation for the action, and that the plaintiff was entitled to recover. He also charged them to find the fact specially, whether the transaction was a sale or a discounting of the prize.

The jury returned a verdict for 10,000 dollars in favor of the plaintiff, stating, at the same time, that the transaction between the defendant and Kane, was not a sale of the ticket, but a mere discounting and settlement of the prize.

Mr. Jay, on the part of the defendant, now moved for a new trial. He contended, that the whole transaction was illegal, and that no cause of action could arise out of it. By the statute of this state, [ss. 42. ch. 206. sec. 3.] it is declared (he said) that any person who shall either sell or purchase a ticket in any lottery unauthorized by the laws of the state, shall be liable to be indicted for the offence, and on conviction, shall be subject to a fine and the costs of prosecution. The selling and purchasing of the ticket in question, was, therefore, by the force of the statute, an illegal transaction. Kane acquired no title to the ticket by the purchase, and having no legal claim to the prize, he could not maintain an action to recover the proceeds of it in any shape. To give him a right to claim the money, would be to give validity to a purchase prohibited by law. Kane could claim the money

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only upon the ground that he was the owner of the ticket ; but as his claim to *that* is void by law, so his claim to the proceeds of it must be void also.

Suppose the managers of the lottery had refused to pay the prize, could any action for it have been maintained by Kane ? It is very clear, that he could not support any such pretence in a court of justice, considering the provisions of the statute ; and as he had no legal claim to the prize, or the ticket, it is difficult to understand how he could maintain an action for the money received out of it, by the defendant. The illegal act lies at the bottom of the whole transaction, and if this action can be maintained, then the purchase of the ticket is made valid. The consideration for the implied promise in this case, springs from the sale of the ticket, or its transfer. But that is not a *valid* consideration, and it will not, therefore, support the assumpit. [Carman v. Bryce, 3 Barn. and Ald. 179.]

Mr. Anthon, contra, for the plaintiff, contended, that although the transaction, as between the original vendor and vendee might have been illegal, and in violation of the lottery act, yet that a third person, who had received a part of the proceeds of the ticket, after the lottery was drawn, by way of loan, could not set up the illegality of the original transaction by way of defence. Kane (he said) before the lottery was drawn, was the owner of the ticket.—After it was drawn, he procured his prize to be discounted by the managers. The defendant, as his agent, received the money, and then, Kane, by way of favor, loaned to the defendant the sum of ten thousand dollars, taking his promissory notes as evidence of the debt. Now, it can never be maintained, that he who borrows money of another, can protect himself against repaying it, by showing that the lender obtained the money by an illegal transaction. The money, as between the newly contracting parties, is not contaminated with the original taint,—and to allow such a defence, would disclose a source of fraud which would not long be left unexplored. [Tenant v. Elliott, 1 Bos. and Pul. 3. Farmer v. Russell, 1 Bos. and Pul. 296. Petrie v. Hanney 3 Term Rep. 418.]

Per Curiam. It is very clear, from the facts of this case and the finding of the jury, that the money obtained by the defendant from Yates & Mc'Intyre, as the proceeds of the prize, was money had and received by him for the use of the plaintiff. It was obtained by him as the money of Kane, and so it was treated by the parties. Kane was evidently the owner of the ticket antecedently to the drawing of the lottery, and after the ticket was declared a prize. As the agent of Kane, the defendant undertook to convert the prize into money, and having succeeded in that undertaking, Kane loaned to him 10,000 dollars, being a part of the proceeds of the prize. Whatever there was of illegality in the transaction, as to the sale or purchase of the ticket, was perfectly past at the time of the transaction between the defendant and Kane.

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The consideration of the new contract was wholly independent of the sale of the ticket, and in no way connected with that transaction, except that Kane obtained the money loaned to the defendant from that source. This action may, therefore, be maintained, without affirming the illegal transaction ; and although Kane could not, perhaps, have enforced his claims for the prize against the managers, yet, having obtained the money for it, a borrower of that money cannot set up the illegal act of Kane in obtaining it, as a legal reason for not repaying the sum borrowed.

The defendant, after he had closed the whole transaction as to the sale of the ticket, and the collecting of its proceeds, borrowed a sum of money of Kane, for which he gave his notes. These notes are evidence of a new contract, arising subsequently to the illegal transactions connected with the ticket. They remain unpaid. The plaintiff brings them into court, surrenders them up, and demands a repayment of the money loaned. His claim does not rest upon the transaction connected with the ticket, but upon a mere loan of money.

The money borrowed by the defendant, it is true, was at one time, incidently connected with a sale of a ticket in a lottery, unauthorized by the laws of this state, because it was the produce of that ticket. Kane and the defendant may have been liable to an indictment for a violation of the lottery act, and their conduct,

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in relation to the sale and purchase of the ticket, may have been entirely illegal. But it is too much to say, that the defendant can resist this claim upon the ground that Kane had violated the laws by the purchase of a ticket, and that, therefore, he is exonerated from the repayment of the money borrowed, because it was at one time the fruit of an unlawful transaction.

We are satisfied that this defence cannot be maintained, and the motion for a new trial must therefore be denied.

Motion for a new trial denied.

[E. Anthon, Atty for the plff. P. A. Jay, Atty for the deft.]

JOHN JONES versus CORNELIUS R. VAN RANST.

A motion for a retaxation of costs in this case was allowed, with directions, that in all cases where the opposite party requires it, the *names* of the witnesses who attend at a trial, or reference, shall be inserted in the affidavit of attendance; and that no fees be allowed to attorney or counsel, for attending at any adjourned meeting of referees, unless such adjournment shall be made on the application of the adverse party, or shall have taken place after a long interval of time, when from the absence of a referee, or other sufficient cause, no meeting has been held.

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versus
THE NATIONAL INS. CO.

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Where foreign plaintiffs become insolvent after the commencement of a suit, and the 100 dollars, required by the 55th rule of this court, are deemed an inadequate security for the costs which may accrue, the court will compel the plaintiffs to file proper security for the costs, and will stay proceedings until the security be furnished.

Mr. J. Anthon, in behalf of the defendants in this cause, showed to the court, that the plaintiffs, (who resided in Philadelphia,) had become insolvent since the commencement of the suit, and he moved that proper security for the costs, which might accrue, should be filed; alleging that the one hundred dollars, required by the usual rule, furnished an inadequate security. There were two causes, he said, pending between the parties, and his motion extended to both.

Mr. Geo. T. Talman, contra, for the plaintiffs insisted, that there were no good grounds for the demand of additional security, as the cause had been long at issue, and the principal part of the expenses of it had already accrued.

Per Curiam. The security furnished under the ordinary rule is not sufficient to indemnify the defendants for their costs, if they should in the end prove successful; and the plaintiffs must, therefore, furnish security to the amount of 200 dollars in each suit. In the meantime, the proceedings must be stayed for 20 days, in order to give the plaintiffs an opportunity to furnish the security required.

[Hoffman & Talman, Atty's for the plffs. E. Anthon, Atty for the deft.]

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ELLEN TOOKER, Executrix, and DANIEL TOOKER and JOSEPH SMITH, Executors of the last will and testament of SAMUEL TOOKER, deceased,

versus

PHILO DOANE.

To an action of debt on a bond, the defendant pleaded his discharge under the insolvent act. The plaintiffs replied, that the defendant afterwards ratified and confirmed the bond and waived the benefit of his discharge.

To support the issue taken on this replication, the plaintiffs produced a paper, signed by the defendant more than two years after his discharge, wherein he agreed that the obligee "might make any settlement he thought proper with one Sexten (for whose benefit the bond was made) without giving up any lien he might have on the defendant for the amount of the bond." Held, that the proof did not support the replication, and that the agreement was no waiver of the discharge.

Sexten, it appeared, after the date of the discharge, made two payments on the bond; but as it was not shown that they were made with the knowledge or assent of the defendant, it was held that no inference unfavorable to him could be drawn from the acts of Sexten.

THIS cause was transferred from the Supreme Court to this court, by a consent of parties, and the questions raised in it were presented by a case made. The action was debt on a bond for four thousand dollars, bearing date the first of September, 1815, with a condition for the payment of one thousand dollars in one year from its date, and a further sum of one thousand dollars on the first day of September, 1817.

The defendant pleaded a discharge, bearing date the 21st of August, 1818, under the 9th section of the "act for giving relief in cases of insolvency," passed April 12, 1818.

The plaintiffs replied, that "after the supposed discharge mentioned in said plea," to wit, "on the second day of September, in the year 1818, in the lifetime of the said Samuel Tooker," "the said defendant agreed to, ratified and confirmed the said writing obligatory," and "waived the benefit of the said supposed discharge:"—and upon this replication the defendant joined issue to the country.

The cause was tried before Mr. Justice Oakley, and at the trial, the plaintiffs proved the due execution of the bond, by a subscribing witness, together with the following endorsements, which appeared upon it, viz.:—“Received, New-York, July 18, 1816, from Philo Doane, by the hand of Thos. Sexten, 750 dollars on account of the principal of the within bond.

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“Also, received at the same time, 250 dollars; and likewise 61 dollars and 44 cents, interest on 1000 dollars to this day.

“SAMUEL TOOKER.

“Witness, SAMUEL S. ROGERS.”

Rogers, being called as a witness, testified, that although he had no recollection of the payments mentioned in the endorsements, yet he did not doubt that they were made in his presence, from the fact of his name's appearing upon the paper. Annexed to the bond there was an instrument of the following tenor, in the handwriting of Doane, the defendant:

“I, Philo Doane, named in the annexed bond, do hereby consent that Samuel Tooker, who is also named in the annexed bond, make any settlement he may think proper with Thomas Sexton, (*and for whose benefit the annexed bond was given,*) without giving up or losing any lien that the said Samuel Tooker, his heirs or assigns may have upon me for the amount of said bond, in consequence of making any such settlement. In witness whereof, I have hereunto set my hand and seal *this second day of September, 1816.*

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The plaintiffs' counsel also offered in evidence the insolvent papers, presented by the defendant when applying for his discharge, for the purpose of showing that the plaintiffs' debt was not enumerated among those specified in the defendant's account of his creditors and estate. These being objected to by the counsel for the defendant, as irrelevant under the pleadings, were excluded by the presiding Judge.

The counsel for the defendant then offered to produce his original discharge, for the purpose of showing that it was signed after the payments were made. This being objected to by the

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plaintiffs, it was excluded as unnecessary, the discharge itself being spread upon the plea, *in hoc verba*.

Upon this state of facts, a verdict was taken for the plaintiffs by consent, subject to the opinion of the court upon this case.

The cause was now argued by *Mr. W. Mitchell* and *Mr. Slosson* for the plaintiffs, and by *Mr. W.T. McCoun* for the defendant.

For the plaintiff it was contended, that the admission of a debt as subsisting, after the time to which the discharge applied, was a waiver of the discharge,—and that such an admission was apparent in this case. [2 *H. B.* 116. 7 *T.R.* 97. 14 *John. R.* 117. *Doug.* 160, 192, 393.]

II. That the discharge applied only to debts contracted before the *petition* was presented. [2 *Esp. R.* 736. 4 *Cowen's R.* 607.]

III. That, under the issue in this cause, it was competent for the plaintiffs to show, and from the evidence it appeared that the bond, though in form for the payment of money, was executed by the defendant as a *surety*, and was not forfeited at the time of the discharge. If, however, the defendant was to be treated as a principal, then, that he was liable under the first point. [*Also v. Brown, Doug.* 192. *Coupl.* 544.]

IV. That an express promise to pay a debt barred by the insolvent's discharge, was not necessary to avoid the discharge; but if necessary, that such a promise was contained in the writing of September, 1818.

V. That the testimony offered by the plaintiffs and overruled by the presiding Judge, should have been admitted, as it showed a mutual understanding between the testator of the plaintiffs and the defendant, that the discharge should not apply to this bond.

Mr. McCoun, contra, for the defendant. The pleadings and issue joined between the parties, admit the discharge to be a

valid discharge of the debt in question, up to the second of September, 1818. The evidence of the debt was a bond for the payment of money, and it was of course included among the debts which the defendant owed at the time of his discharge. If there is no waiver of the discharge, the discharge is a bar to the action ;—and this is admitted by the replication. The replication, instead of denying the validity of the discharge at the time it was obtained, sets up new matter to avoid it, and we are brought down to the single question presented by the issue; namely, whether the defendant ever did ratify the bond and waive his discharge.

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II. The plaintiffs rely upon the paper signed by the defendant and annexed to the bond. That paper is not a ratification of the bond as a *debt* against the defendant, nor a waiver of the discharge. A subsequent *acknowledgment* merely, will not renew a debt which is *discharged*; there must be an express promise to pay it, or the defendant will not be liable. [1 Stark. N. P. R. 370. 5 Esp. Cas. 198. 2 H. B. 116. 4 Taunt. 613. 2 Burr. 736. 2 Stark. on Ev. 209—10.]

The promise must be precise and positive. In the case cited from Taunton, the debtor promised to pay the old debt by instalments, without expressing the times when or the specific sums; and the promise was held insufficient to bar the discharge.

In this case, it is fair to presume that Sexten was under a moral obligation to pay the bond, as it was made for his benefit. The obligee, being desirous of making a compromise with Sexten, did not wish to lose by his own act any possible hold he might have upon the defendant. He therefore obtained the consent upon which the plaintiffs rely,—but it will not be found to contain an admission, or a promise, or a waiver. It merely permits a settlement with Sexten, without giving up any claim which the obligee *might* have upon the defendant. If he had no claim in September, 1818, the paper in question gave him none, and he cannot recover.

The issue, therefore, taken by the plaintiffs is not supported,—for it cannot be pretended that the payments made by *Sexten*

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can implicate the defendant. It does not appear that he ever heard of the endorsements until the day of trial; and clearly, no act of Sexten could prejudice the defendant, unless ~~assented~~ to by him.

III. As to the insolvent papers rejected at the trial, they were evidently inadmissible. If the bond was not enumerated among the defendant's debts, it would prove that he did not admit its validity as a subsisting debt, and no inference unfavorable to the defendant could be drawn from the omission.

But the plain answer is, that the papers, if admitted, would not avoid the discharge. If *that* was obtained by fraud, and by omitting to enumerate all the creditors of the petitioner, the plaintiff should have alleged the fraud as a reply to the discharge. But having taken issue upon a fact which admits its validity, the insolvent papers became wholly irrelevant.

JONES, C. J. It is clear that the discharge, which is admitted by the replication in this case, is a bar to the action, unless the matter set forth in the replication, has been established by the evidence, and is sufficient to obviate the effect of the discharge, and remove the bar it created. The substance of the replication is, that the defendant has waived the benefit of the discharge, by a subsequent recognition of the bond as obligatory upon him, and the ratification of it as a subsisting debt.

It is settled, that a subsequent promise to pay, will avoid the operation of a discharge, which would otherwise bar the recovery of the debt so promised to be paid. In this case, the old debt, which the testator was bound, under a penal obligation, to pay, constituted a sufficient consideration to give effect to a promise, which might repel the force of the discharge, and remove the obstacle it would otherwise oppose to the action on the original demand. But here there is no express promise to pay the debt. The utmost that can be successfully contended for, is the admission of the bond as subsisting against the testator, and the waiver that admission implies of the benefit of the discharge, or a promise inferable from the receipts endorsed on the bond,

or the consent of the 2d of September, 1818, or both conjointly, to pay the debt.

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The question then presented will be, first, whether such an admission, or implied promise, has been shown in the present case, and if so, whether it is a sufficient waiver of the discharge, to operate as an avoidance of it, and obviate its force as a bar to the action on the bond.

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Upon the first question, as to the fact of the admission or promise, the only evidence of it is, the endorsement on the bond, of the payments of principal and interest, on the 18th of July, 1816, and the consent bearing date the 2d of September, 1818.

The payments, according to these endorsements, are prior in point of time to the discharge, which was given on the 21st of August, 1816, and, admitting the position assumed by the plaintiffs, that the payment of interest admits the subsistence of the principal debt, the evidence of that endorsement, can have no bearing on the question, unless it be true, as the plaintiffs assume it to be, that the discharge in this case, applies only to debts contracted anterior to the presentment of the petition.

In the case of *M'Neilly v. Richardson*, [4 Cowen's R. 607.] it was held that the discharge under the *first* section of the act, upon the application of the insolvent, in conjunction with two thirds of his creditors, refers to the existing state of things at the time of presenting the petition; and that debts contracted, or accruing subsequently to that time, though they fall due before the discharge, cannot be proved under the assignment, and are not barred, or affected by the discharge.

In this case, the application was by a creditor, under the 9th section of the act, which is supposed to be hostile to the debtor, and has for its foundation, the apprehended waste or embezzlement by him of his estate or effects. The debtor is not intended, and does not appear to have any agency in the proceeding.

Another prominent distinction between the two cases deserves to be noticed. It is this; the insolvent who petitions under the first section of the act, is required to deliver to the Judge, at the time of presenting his petition, a full and true ac-

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count of all his creditors, and the moneys owing by him to them respectively, together with a full, true and just inventory of all his estate, both real and personal. But when the creditor applies for relief under the 9th section of the act, no account of creditors or inventory of estate is required to be delivered by the insolvent, until an assignment shall be directed by the Judge to be made.

Still, however, the provisions of this section of the act, look to the creditors of the imprisoned insolvent, at the time of the application for relief, and the order, the Judge is to make, upon the application, is, to show cause why an assignment should not be made of the debtor's estate, for the benefit of all such creditors. And if the insolvent make the assignment directed, he is to be discharged in like manner, as if he had petitioned for his discharge, in conjunction with the creditors, under the first section of the act; but if he refuses, or neglects to do so, an assignment of his estate is to be executed by the magistrate, and which the act declares shall vest in the assignees, the whole of the estate which belonged to the insolvent, on the day of the first publication of the order to show cause why an assignment should not be made.

The construction of the 9th section, therefore, must substantially correspond with that of the 1st; and a debt accruing subsequently to the order to show cause, would not be proveable under the assignment, nor barred by the discharge. It is settled, that the renewal of an old debt by a new promise, will obviate the effect of a discharge, and the case cited from Espinasse is in point, to show, that the time of making such new assignment is not material. In that case, it was made intermediate the issuing of the commission and the signing of the certificate, and it was held effectual. There the acts relied upon as renewing the debt, were after the full publication of the order to show cause, but previous to the discharge, and if sufficient in themselves to revive it, will have that effect.

In the case of *Alsop and another v. Brown*, [Dougl. 191,] which was an action of debt on a bond, to the trustees, under one Wilson's will; the defendant, who was a principal debtor.

pleaded a bankruptcy, and on the trial it appeared, that interest had been paid on the bond, after the defendant obtained his certificate, but it did not appear whether such interest was paid by the defendant, or one of his sureties. Lord Mansfield said, that if the interest was not paid by the *bankrupt* there was no question; but, that if it was, it would be an admission by him, that the principal was then due, and he might be liable as on a new contract.

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In the case before us, the payments were confessedly made by Sexten, for whom the bond was given, and not by the insolvent. It is true, that the money is expressed in the receipt, to be received from Doane the obligor, by the hands of Sexten; but that form of expression may have been used merely to show that it was a payment on account of the bond, and to go to the credit of the obligor, as he alone was bound by the obligation for the money; and the legal effect of a payment, by any person, would be a payment and receipt for the obligor.

This payment therefore must have been made by Sexten, the principal, and cannot, on the declaration of the receipt alone, be claimed to establish the admission of the debt by the obligor, so as to waive the benefit of his discharge as a bar to the action.

The next question is, whether the writing or consent of the 2d of September, 1818, amounts to such an admission? That writing was signed by Doane, the obligor, and by it, he consented that Tooker, the obligee, might make any settlement with Sexten, without giving up or losing any lien he might have on him, Doane, for the amount of the bond by such settlement.

This the plaintiff insists upon, as an acknowledgment of the bond, which binds the defendant to the payment of the debt; and the opinion of Lord Mansfield, in the case cited from Douglass, is relied upon as an authority for his liability.

The defendant does, certainly, by his consent, recognise the bond as a subsisting security; but does he admit that it is obligatory upon him, or is it fairly to be inferred from the expression he uses, that he acknowledges his present liability to pay it? The actual payment of interest on a bond, is the clearest testimony that can be offered of the admission of the party who

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pays it, of his liability to pay. But do the terms of this consent, import so strong and unqualified an admission that the principal debt was then due from the defendant, as the payment of interest by him would have implied?

The permission to make a settlement of the debt with Sexten, assumes that the obligation of paying the debt lies upon him. But does the consent that such a settlement may be made by the obligee with Sexten, without giving up any lien the obligee may have upon Doane for the amount of the bond, necessarily admit that Tooker then had a lien, or claim upon Doane for the whole amount which might be enforced against him? If the parties fully understood at the time that Tooker had a subsisting demand against Doane upon the obligation, which the consent was intended to preserve, the bond would undoubtedly have been treated as an *undisputed* debt of Doane. But what could have induced Tooker, the obligee, if the legal obligation of Doane was admitted, to employ language in his consent to settle with Sexten, which imparted a *doubt* of the subsisting liability of Doane, and was calculated to embarrass him in his future recourse to Doane, in case of a failure of satisfaction from Sexten? The fair presumption from the acceptance by Tooker, of a consent so guardedly worded is, that his lien or claim upon Doane for the amount of the bond was *not conceded*, and might be questionable.

It was asked why the consent should be required or given, if the debt was understood to be barred by the discharge? The answer is, that probably some question had been raised as to the effect or legal character of the discharge; and Tooker wished to secure whatever right he might have.

On the part of the defendant it was broadly contended, that an absolute and unqualified admission of the bond as a subsisting debt, would not countervail the effect of the discharge, but that the bond required an express promise of payment to obviate the bar, and the case of *Mucklow v St. George*, [4 Taunton 612,] favors that opinion. In that case the defendant being indebted to the plaintiff on a promissory note, took the benefit of an insolvent act, and being called upon, after his discharge, by the servant of

the plaintiff, for the debt, he inquired the amount of it, and being informed, he answered that he was not able at that time to discharge it, but his friends were about to do something for him, and he would pay the debt by instalments. At the trial the plaintiff relied upon this answer as evidence to establish a new promise to pay, but was nonsuited. On a motion to set aside the nonsuit and for a new trial, the counsel contended that this amounted to a promise to pay the debt by reasonable instalments within a reasonable time. But the court dissented from the proposition, and observed that this case was not like cases under the statute of limitations in which the evidence might suffice to revive the debt. The answer of the defendant in that case was too indefinite and uncertain to establish a binding promise to pay the debt, the amount of the instalment and the time of payment being undefined and unsettled, and the promise obviously based upon the aid he expected from his friends, and which it did not appear that he had received. But it was a clear admission of the debt, and an acknowledgment of his present liability to pay it; yet it was not held sufficient to revive the debt.

I am not prepared to say that an express promise is necessary to the avoidance of the bar, created by the discharge. It is not necessary for the decision of this cause to push the principle to that extent, and such a rule would hardly conduce to the purposes of justice. The conduct of parties often speaks as intelligibly and as strongly as their language; and undeniable acts of recognition, such for example as the payment of interest or a part of the principal, indicates a sense of present liability, and an engagement to pay as clearly, as an express promise could do. Such acts carry with them internal evidence of the waiver of the discharge, and the renewal of the obligation of the debtor to pay the debt. For the same reasons, and on the same ground, a clear acknowledgment of the debt, as a present subsisting obligation of the party, freely and understandingly made, ought to be, and in my judgment is, equally with a part payment of the demand, a waiver of the discharge, and a renewal or revival of the legal obligation to pay the debt. But there must be a distinct and unqualified admission of the debt, and an acknowledg-

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ment of the debtor's continuing and subsisting liability to pay it, in order to obviate and repel the operation of the discharge, and enable the creditor to recover in an action for the antecedent demand.

Does the writing in this case import such an admission of the bond and acknowledgment of its continuing and binding obligation upon this defendant, as to manifest a waiver by him of the benefit of his discharge ? Or is the consent and authority it gives so cautious and qualified, as to preserve to him all the protection which that discharge could give him ? I understand the writing as intending to authorize a composition with Sexten, the principal debtor, without discharging him from his obligation as surety ; but I can discover no trace of any intention to waive the benefit of the discharge, or to admit any present liability on the part of Doane to pay the debt. And in my judgment it would be a forced construction of the consent, to infer from it the broad and unqualified recognition of the bond as a subsisting debt which he was absolutely unable to pay, or to ascribe to it any other meaning or legal effect than that of a license by the defendant as surety to the obligor to compound with the principal, and a consent that such composition should not be made the ground of defence to an action against him, in case the plaintiff should at any time be disposed to contest the validity of his discharge.

But it was further urged, that the bond was not considered, or treated by the defendant as his own debt, but was regarded as the debt of Sexten, to be provided for and paid by him, and that it was not considered as provable under the assignment, or barred by the discharge ; and in proof of this, the payments by Sexten, and the subsequent recourse to him by Tooker, were advanced as decisive evidence ; and the insolvent papers showing that the debt was not included in the account of creditors, nor any notice taken of it by Doane, or proof made of it by Tooker, as a creditor, were offered to justify and corroborate this understanding. These documents all concur in showing that Doane did not look upon the bond as a debt which he was to pay ; and the probability is, that all parties understood that Sexten alone

was to be held answerable for it. But this understanding of the parties could not change their legal obligations, nor could the omission of Doane to insert the debt in his inventory, exclude the creditor from his right to a dividend of the estate, or obviate the effect of the discharge as a bar to the debt. Nor was that understanding, or the acts which grew out of it, of any material weight in the scale of evidence to establish the continuing liability of Doane for the debt, or his admission of such liability after his discharge. The just inference deducible from his silence in his insolvent papers as to that debt, would seem to be that he did not hold himself liable for the payment of it, but that it was understood and arranged at the time of his assignment, that Tooker was to exonerate him, and look solely to Sexten. The contemporary payments by Sexten, pending the application for the discharge of one half of the debt, with the interest on that moiety up to the day of payment, justifies that conclusion, and favors the idea that the arrangement was to relinquish all claim upon Doane, the surety, and look to Sexten for the residue. The reliance upon Doane, on the faith of that arrangement, may have induced him to omit the debt in his account, which he would have been otherwise bound to insert.

Be that as it may, the omission could give Tooker no claim upon the insolvent personally for the debt, unless it was fraudulent, and as no fraud was pretended, the proof of the omission by the production of the papers, was not material, and the evidence was properly rejected.

OAKLEY, J. The question in the case is, whether the evidence supports the issue on the part of the plaintiffs.

As to the payment on the bond, made by *Sexten*, it is sufficient to remark, that it cannot be considered as the act of the defendant. The receipt was endorsed on the bond, by the plaintiffs' testator, and to make it the ground of inferring an acknowledgment by the defendant of the existing validity of the bond, and a promise to pay it, there should be clear proof that the payment was made by the authority or at the request of the defendant. There is no such proof in the case, and at the time the payments

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were made, the defendant had assigned his whole estate. The money was paid by *Sexten*, and his act surely cannot conclude the defendant's rights.

The principal question is, whether the agreement between the parties, of the 2d September, 1818, is sufficient evidence of the fact set up in the replication. The defendant, on that day, agreed with the plaintiffs, in writing, that he might "*make any settlement* with *Sexten*, (for whose benefit the bond was given,) "without giving up or losing any lien which he might have on "the defendant for the amount of the bond." It is contended by the plaintiffs, that it must be necessarily implied from this agreement, that the defendant considered the bond, as then, valid and subsisting, and that a promise to waive the benefit of his discharge and pay the bond, may be inferred from it.

I think that this would be too forced an inference. The fair import of the agreement appears to me to be, that the then existing rights of the parties, were to remain unimpaired by the intended arrangement with *Sexten*. The plaintiffs were at liberty to question the validity of the discharge, either upon the ground of its unconstitutionality, or on the ground of fraud, in obtaining it. The arrangement with *Sexten*, if made without the consent of the surety, might have discharged the bond, independently of the discharge under the insolvent act. It is reasonable to conclude, that the agreement in evidence was resorted to, only for the purpose of avoiding that consequence. At least, that construction of it will give full effect to its terms, and no further inference necessarily results from it. As for the insolvent papers which were offered in evidence by the plaintiffs, it is quite clear that they were irrelevant and inadmissible under the issue. They could not avoid the effect of the discharge as it appears upon the record, and they did not in any manner conduce to prove the facts set up in the replication.

I am of opinion, on the whole case, that the defendant is entitled to judgment.

Judgment for the defendant.

[William Mitchell, At't'y for the piffs. Seaman and Wills, At't'ys for the def't.]

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Where the attorney for the plaintiffs, through inadvertence, neglects to file a replication to the defendant's plea of payment, and takes an inquest against him before the pleadings are formally closed; the court will, under proper circumstances, permit a replication to be filed after the inquest, *nunc pro tunc*.

But where the defendant's attorney was aware of the fact, that the replication was not filed, and lay by for the purpose of availing himself of the defect, and then, upon the plaintiff's application for leave to file his replication, *nunc pro tunc*, the defendant himself *swores to a defence upon the merits*, the court refused to allow the replication to be thus filed, but compelled the defendant to pay all the costs of the inquest and the motion, as a condition upon which the plaintiff's application was refused.

Mr. E. Burr, in behalf of the plaintiff in this cause, moved for leave to file a replication to a plea of payment, *nunc pro tunc*. It appeared, that the defendant had suffered a default, and had allowed an inquest to be taken, but the cause had never been put at issue upon the plea of payment. Mr. Burr read an affidavit of the plaintiff's attorney, setting forth, that his neglect to file the replication had proceeded from inadvertence merely.

Mr. E. Barnes, for the defendant, read a counter-affidavit of the defendant's attorney, stating that he was aware, during the progress of the cause, that no replication had been filed to the plea of payment, and that he had never considered the cause as at issue upon that plea. That he had, anterior to the trial, applied to the plaintiff's attorney for some favor which had been denied, and that, thereupon, he had intentionally neglected to take any part at the trial, believing that the plaintiff's proceedings, if he ventured to take an inquest, would be erroneous. Mr. Barnes also read an affidavit, made by the defendant himself, stating that he had a good defence upon the merits.

Mr. Burr contended, that the plea of payment, under our practice, was a mere matter of form, as the defendant had a right to set up every defence under the general issue, which

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could be made under the plea of payment, and he therefore insisted that the court, having the power to grant his motion, would not deny it under the peculiar circumstances of this case.

Mr. Barnes, contra, contended that, as the defendant had sworn to merits in his defence, the court would not deprive him of the privilege of trying his rights. If the attorney had been guilty of neglect, still his client's rights were not to be sacrificed. Here, in the strictness of practice, the plaintiff was irregular, and he could not therefore ask a favor of the court, which would prejudice the defendant.

Per Curiam. To a certain extent, the rights of a party may be concluded by the acts of his attorney, and he cannot always shelter himself under the defence here set up. If the plaintiff in this case, had proceeded in such a manner as to take the defendant by surprise, and his attorney, supposing that no inquest would be taken until the replication was filed, had, from this cause, neglected to interpose his defence; then, as the defendant has sworn to a good defence upon the merits, the court would, as a matter of course, deny this application, and set aside the inquest. But here the defendant's attorney admits that he was not surprised; on the contrary, he avers, that he lay by for the purpose of taking advantage of the inadvertence on the part of the plaintiff's attorney, relative to the replication. As the plea, under our practice, in a case like the present, is a mere matter of form, the court would allow the replication to be filed *nunc pro tunc*, were it not that the defendant has sworn to merits. The court will not deprive him of his rights, for the misconduct of his attorney; but as the attorney is his agent in the cause, the court will connect them together to a certain extent. The power of the court over the whole matter is undoubted, and if they deny the application, it may be upon such terms as they see fit to impose. The application, under the circumstances of the case, must be denied, but the court direct that the defendant shall pay all the costs of the inquest, and of this motion, as the terms upon

which the application is denied ; otherwise the plaintiff's attorney has leave to file his replication *nunc pro tunc*, and thus perfect his judgment.

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HENRY PACKARD, SCOTT FICKET, FRANCIS FICKET, and JOHN
W. RUSSELL.

In an action of assumpst against several joint owners of a ship, for work and labor performed in rigging her, it appeared that the plaintiff had taken the promissory note of one of the joint owners, payable sixty days after date, for the amount of his bill, and given him a receipt in full of all demands up to a certain date. The Judge charged the jury, that the taking of the note, under the circumstances of the case, was not a discharge of the plaintiff's claims against the other owners, unless it was taken in fact, as payment, and with the intent to discharge the other owners. HELD, that this charge was correct in point of law.

This is the same cause which was formerly before the court, upon a case made. [*ante*, p. 226.] The court on that occasion, gave judgment for the defendants, but, by an arrangement of the parties, it was again brought before the jury, and tried at the last July term before Mr. Justice Oakley.

The evidence introduced at the second trial did not differ materially from that produced on the former occasion, and it is not therefore recapitulated here. The Judge charged the jury that the written evidence of title, exhibited by the defendants, was not conclusive in the cause to fix the time when *Packard's* ownership began. That such ownership might have existed previously to the date of the bill of sale. That it was for the jury to say, from all the circumstances of the case, whether he was interested in the ship at the time the work and labor were performed. If they found this to be the case, then that their verdict would be for the plaintiff, unless he had by some subsequent act

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1828.

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others.

discharged Packard from his liability. That the taking of Russell's note, by the plaintiff, was not such an act, unless he took it in fact *as payment*, and with the intent to discharge the other owners, or had been guilty of negligence in obtaining payment of Russell. That as Russell was proved to be insolvent at the time the note was given, it did not appear to him that the plaintiff had been guilty of any culpable negligence, but the jury were to judge under all the facts of the case.

The jury returned a verdict in favor of the defendants, and the plaintiff now moved for a new trial upon the ground, I. that the Judge erred in charging the jury in substance, that the note of Russell was a discharge of the other part owners, if they should find that the plaintiff had taken it as payment, and with such intent. II. That the verdict was against evidence.

The cause was argued by *Mr. Anthon* for the plaintiff, (who cited 5 J. R. 68. 1 Cowen's R. 304. 17 J. R. 340. *Gow* on Part. 18, 19,) and *Mr. Talman* for the defendants. The latter cited 5 J. R. 68. 12 Ib. 409, [*Arnold v. Camp.*] 5 Esp. Rep. 122.

OAKLEY, J.T. This action was brought to recover of the defendant, *Packard*, as one of the owners of the ship *Russell*, the amount of a bill for rigging that vessel. The question whether *Packard* was interested in the ship at the time the work was done, was fairly left to the jury, and their verdict on that point must be conclusive; and the more so, as it seems to me to be supported by the weight of the evidence.

It appears, that after the work was performed, the plaintiff took the note of one of the owners of the ship for the amount, and it was contended at the trial, by the defendant, *Packard*, that the taking of the note, under the circumstances, was a discharge of the plaintiff's claims against the other owners. The Judge told the jury, that it was not, unless they should be satisfied, that the plaintiff had taken it "*in fact as payment, and with the intent to discharge the other owners.*" The plaintiff now complains that there was error in this direction.

It might be sufficient to say, that no objection to the Judge's charge was intimated at the trial. But it appears to me, on further reflection, that the charge was correct.

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v.

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In [12 J.R. 411,] the S.C. after reviewing several of the cases on this subject, lay down the rule to be, that if the taking of a note is "*intended and agreed to be considered as payment*" of a pre-existing demand, the latter is thereby discharged. The direction of the Judge, in the case now before us, is entirely in conformity with this rule, and indeed goes beyond it, in favor of the plaintiff. The jury were told, that they must find not only that the note in question was taken in fact as payment, but that the plaintiff intended thereby to discharge the other owners. This was certainly equivalent to telling them that they must be satisfied that it was *intended and agreed* by the parties, that the note should be considered as payment ; and the plaintiff has no right to complain of the charge of the Judge in this respect.

Motion for a new trial denied.

[E. Anthon, Atty for the plff. Hoffman & Talman, Atty's for Packard.]

Dec. Term,
1829.

Dacy

v.
The N. York
Chemical
Manufacturing Co.

JOHN DACY

versus

The NEW-YORK CHEMICAL MANUFACTURING COMPANY.

The wife of the plaintiff being entrusted by him with certain sums of money, and directed to deposit them in some bank for safe keeping, opened an account with defendant's in her own name, and deposited the money in their bank: The defendants were not aware at the time of the deposits, nor until the money had been entirely withdrawn from the bank, that the depositor was a married woman, and they therefore gave her a bank book in the ordinary form, and prescribed the mode in which her checks should be made, as she was illiterate and could not write.

Under this arrangement the wife drew out of the bank, upon checks in her own name, at various times, the entire sums deposited,—and her husband then discovering that his money was gone, brought an action of assumpsit against the bank, to recover the amount of the deposits. Held, that he was not entitled to recover. That the wife, being the agent of the husband to make the deposits, might fairly be presumed to have had authority to withdraw them; but if this were otherwise, as the bank had no notice of the agent's coverture, and as the husband had enabled his wife, by entrusting her with the money, to do the wrong,—that the loss accruing from her breach of trust should fall upon him, rather than upon the bank.

4 Paig, Mech
at p. 136

ASSUMPSIT to recover of the defendants the sum of 481 dollars, deposited in the Chemical Bank, under the following circumstances. The plaintiff was an illiterate man, who kept a grocery, and his wife was in the habit of attending the shop during his absence. Neither of them could read or write; but, in the course of their business, having accumulated a quantity of specie, the plaintiff told his wife to deposit it in some bank. She, thereupon, went to the defendants' bank in company with a person by the name of Hoy, (who was understood, at the bank, to be her son) and desired to open an account with them. A book was accordingly given her, in which her deposits were credited, and as the defendants did not know that she was a married woman, the account was opened in the name of "Mary Dacy," and she was directed by the cashier to place her mark upon her checks always in the presence of Hoy, her son, as a witness, and that upon their being presented, signed by him as a witness, they would be duly honored.

Under this arrangement, the wife, on her first visit, deposited Dec. Term,
the sum of 390 dollars, and at two subsequent periods 90 dollars 1829.
more ; and the bank book which she took away, was afterwards seen in the possession of the plaintiffs. At subsequent periods, the wife (but whether with or without the knowledge and assent of her husband, did not distinctly appear) drew seven checks upon the bank in her own name, which were duly paid, and thus withdrew the entire sums deposited ; but the defendants had no notice of the depositer's coverture until after the transaction was closed. Afterwards the plaintiff took the bank book to a friend for examination, telling him at the same time, that he had heard that his money had been withdrawn from the bank, and as the book confirmed the statement, the plaintiff thereupon brought this action.

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The Chief Justice, before whom the cause was tried, charged the jury, that the questions as to the form of the action, and the right of the defendants to pay the husband's money upon the wife's checks, were questions of law ; and that they were only to determine whether Mary Dacy was authorized to do what she had done, as the agent of her husband, and whether he had in any way ratified her acts.

The jury returned a verdict in favor of the defendants, and *Mr. J. Lynch*, for the plaintiff, now moved for a new trial. He had formerly objected to the production and proof of the checks upon which the defendants had paid out the money, until the authority of the wife to make them was first established ; but his objection was overruled. The counsel for the defendants, on their part, had contended at the trial that the form of the action was misconceived,—that it should have been trover, if the defendants were liable at all, and not assumpsit. This objection was also overruled.

For the plaintiff it was now contended, I. That the checks should not have been received in evidence until the authority of the wife to withdraw the money had first been proved. [1 *Phil. Ev.* 79.] That there was no contradictory evidence in the case, and that the question whether the facts proved amounted to an authority was a pure question of law. [13 *J. R.* 350.]

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1882.

Deasy  
v.  
The N. York  
Chemical  
Manufacturing Co.

II. That the deposit of the money in the name of the wife was unauthorized; but if authorized, it was a deposit for the husband, and could not be drawn out except by his authority.

[*2 Caine's R.* 337-8.]

*Mr. Seely, contra,* for the defendants, contended, I. That the verdict was fully supported by the evidence, and that no assumption could be implied from the facts.

II. That no action could be maintained by the plaintiff, as the money was withdrawn by the wife before any notice of her coverture was received by the defendants. [*1 Term R.* 20. *1 Id. Ray.* 538. 224. *Cumberback* 470.]

OAKLEY, J. It appears from the evidence in this case, that the wife of the plaintiff was entrusted by him with certain moneys, and directed to deposit them in some bank. She accordingly opened an account in her own name with the defendants, and made deposits from time to time. She gave directions at the bank as to the manner in which the money standing to her credit was to be drawn out on her checks, and various checks were accordingly drawn by her for the whole amount. The defendants had no knowledge that she was a married woman until after they had paid all the checks and closed her account. The husband now attempts to recover, on the ground that the payment to the wife was unauthorized.

The Judge submitted the fact to the jury, whether the wife was authorized as the agent of her husband to do what she had done, or whether he had subsequently ratified her acts. The jury found a verdict for the defendants, and I think rightly.

The plaintiff entrusted the wife with the money for the purpose of depositing it. He knew that she was in the habit of making deposits, and though he might not have known that she had opened an account in her own name, as he was unable to read the entries made in her bank book, it is fairly to be presumed that he must have known that she was also in the habit of drawing checks for the money deposited. She was entrusted

with the bank book, and the husband never made any inquiry as to the state of the account in the bank, and the jury were well justified in drawing the inference, that he must have known the true state of the case.

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1889.

Ogilby  
v.  
Wallace.

But if the jury were incorrect in finding the fact of an authority by the husband, on the evidence in the case, it is still clear that the plaintiff has no right to recover. If the wife abused the trust reposed in her by the husband, the defendants ought not to suffer by her fraudulent act, in depositing the money in her own name. By entrusting her with the money he enabled her to commit the fraud, and the loss, if he has sustained any, must fall upon him. In the absence of any circumstance to charge the bank with notice that she was a married woman, they had a right to open an account with her as a *feme sole*, and to pay the checks drawn upon the deposits made by herself.

*Motion for a new trial denied.*

[James Lynch, Atty for the pif. W. A. Seely, Atty for the defr.]

### ROBERT OGILBY versus THOMAS WALLACE.

Where a note is payable to bearer, or endorsed in blank, an action on it may be maintained in the name of any person, without the plaintiff's being required to show that he has an interest in it, unless he possesses the note under suspicious circumstances. If any question as to *mala fide possessio* arise, that is a matter of fact, to be raised by the defendant and submitted to a jury.

Where, therefore, in an action upon a promissory note, payable to order and endorsed in blank, the plaintiff upon the record was a fictitious person, and the Judge for that reason nonsuited him at the trial, although the note appeared to be the property of a real party whose name was disclosed; the court directed the nonsuit to be set aside, that the questions of fact connected with the possession and prosecution of the note, might be submitted to a jury.

ASSUMPT upon a promissory note for 500 dollars, drawn by the defendant in favor of Henry Butler & Co., and payable

Dec. Term, to their order, ninety days after date, and endorsed by them in  
1830. blank.

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v.  
Wallace.

The cause was tried before Mr. Justice Hoffman; and at the trial the plaintiff's counsel having produced the note, and proved the handwriting of the maker and endorsers, rested his cause. The defendant thereupon called a witness, who testified, that Samuel B. Hickox, one of the firm of Henry Butler & Co., agreed with the defendant, that, if he would make the note in question, he, (Hickox,) would cause it to be discounted, retain out of its proceeds 300 dollars for the use of his firm, and deliver the balance to the defendant. That when the note should become due, each party should advance the sum retained by him, and thus discharge the debt. That the defendant, for this purpose and under this agreement, drew the note in question, and delivered it to Hickox; but not hearing of it for some days thereafter, the defendant made inquiry for the note, and found it in the possession of one Thomas Ash, who told him that he had received the note from William B. Hart, to whom he had given, in exchange for it, another note and 130 dollars in cash.

That the defendant then informed Ash of the circumstances under which the note was obtained, and he at first promised to return it to the defendant. Afterwards, the defendant threatened to indict the parties concerned, for a fraud upon him, and thereupon Hart and his father gave the defendant a bond, stipulating for the payment of the note by them at its maturity. This bond the defendant retained until the note became due, but it was not then taken up by Hart; and the defendant being informed that the bond was of no value, returned it to Hart, who promised to pay him 100 dollars on account of the note, if he would renew it for the balance. This proposition was acceded to by the defendant, but never fulfilled by Hart.

The defendant then called the plaintiff's attorney as a witness, who testified, that he received the note of Ash for collection, with instructions that the suit should be brought in the name of *Robert Ogilby*, or some other name. That Ash assigned as a reason for this, that the note belonged to a person, who did not wish his name to appear, and as the name of Ogilby had before

been used in suits by Ash, and as Ash furnished security for the costs, the attorney used the name presented to him, although he did not know any such person as Robert Ogilby.

It further appeared, that Ash deposited the note in the Chemical Bank for collection, and that it remained there for several days after it became due.

Upon this state of facts the presiding Judge required more evidence concerning the plaintiff upon the record, and none being furnished, he nonsuited him.

*Mr. J. S. Mitchell*, for the plaintiff, now moved to set the nonsuit aside. He contended, I. That a promissory note endorsed in blank, is payable to bearer, and that the production of it by the bearer, is evidence of his title. [*Chit. on Bills, 132-5, and note.*]

II. That the defendant by pleading in chief, admitted the due appearance of the plaintiff; and that the substance of the issue to be tried was, whether the defendant was liable or not. [*7 J. R. 373.*]

III. That the bearer of a promissory note, has the right to fill up the blank endorsement with any name he thinks proper, and that he does not divest himself of his title as bearer, by inserting another name than his own. [*11 J. R. 53.*]

IV. That the owner or bearer of a note is not bound to sue in his own name, but may sue in the name of another as his trustee; and who that trustee is, is foreign to the issue. [*11 J. R. 53. 7 Cow. R. 176. 3 John. Ca. 263.*]

V. That a defendant, to protect himself against an unknown trustee, can apply for security for costs; and that a judgment in favor of the unknown trustee, who is plaintiff on record, will be a bar to the same cause of action forever. [*Rule 55. 4 Cow. R. 559.*]

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1829.

Ogilby  
v.  
Wallace.

Dec. Term,  
1822.

Ogilby  
v.  
Wallace.

VI. That security for costs in this cause was duly filed, and that a misnomer either of plaintiff or defendant, could only be taken advantage of by plea in abatement. [1 Chit. Plead. 436. 4 Cow. R. 157.]

VII. That the enquiry as to who the plaintiff on the record is, if matter of evidence, should, like other facts, be passed upon by the jury. That the evidence, or want of evidence, as to who the plaintiff is, did not justify a nonsuit; and that no more evidence upon this point should be required on a trial, than on an inquest.

*Mr. J. R. Whiting, contra,* for the defendant. The defendant may show, under the general issue, that there is no such person as the plaintiff in existence. It is admitted, that any *real* person, with or without interest, may sustain an action upon a negotiable promissory note: but the name of a *fictitious* plaintiff is only tolerated in the action of ejectment, for the convenience of parties.

It is contended by the plaintiff, that this advantage can be taken by plea in abatement only, but it is available under the general issue also. Under this issue the defendant may show, that another person ought to have been made a co-plaintiff; that the defendant has no capacity to contract, &c. [1. Chit. Plead. 470.] Any thing which shows that the plaintiff had no subsisting cause of action at the time of the commencement of the suit, may be given in evidence under this issue. [*Ib.* 472.] The defendant here, showed his own incapacity to contract, by showing the plaintiff's absolute nonentity. There is no foundation for the argument, that a plea in abatement ought to be interposed.

A misnomer of the plaintiff may be taken advantage of under the general issue, and be the ground of nonsuit at the trial. [*Vide, Collman, et al. v. Collins, post.*] In case of the *Bank of Utica v. Smalley*, Chief Justice Savage holds the doctrine, that the defen-

dant should plead the misnomer of the plaintiff in abatement, to be untrue, and not supported by the cases. [2 Cowen's Rep. 780.]

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1829.

Ogilby  
v.  
Wallace.

It is no answer to the objection that security for costs has been filed; that remedy is merely cumulative, and in many cases proves ineffectual. The defendant, if he succeeds, is entitled to a judgment against a real person for his costs.

OAKLEY, J. It is sufficiently shown in this case, that the note on which the suit is brought was the property of Ash, and that it was sued in the name of the plaintiff, as his trustee, and for his benefit. The plaintiff's attorney was called as a witness; and from his evidence, there was good reason to believe that the plaintiff is a fictitious person. The Judge required further evidence as to who he was, with a view, I presume, to ascertain whether he was or was not a real person, and none being given, he directed a nonsuit. It is now moved to set this nonsuit aside.

It seems to be settled, that where a note is payable to bearer, or is endorsed in blank, an action on it may be maintained in the name of any person, without the plaintiff's being required to show that he has any interest in it, unless he possesses the note under suspicious circumstances. [11 J. R. 53. 7 Cow. R. 178.] It also appears to be established, that if any question of *mala fide possessio* arise, that is a matter of fact to be raised by the defendant, and submitted to the jury. In no other case does the court inquire into the right of the plaintiff, as possession will be evidence of property in him. [3 J. Cases, 263.] It is also recognized as a rule, that where the plaintiff on the record is a mere trustee for another, the defendant may avail himself of any defence, (except probably a set-off) which he might set up against the real owner, if the suit were in his name. [7 Cow. R. 177.]

Applying these principles to the case now before us, it would seem that the real inquiry ought to have been, whether *Ash*, the owner of the note, was the *bonâ fide* possessor of it. The circumstances, under which it was obtained from the defendant,

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1829.

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v.  
Wallace.

and put into circulation, were sufficient to throw upon *Ash* the burthen of showing how it came into his hands. The proof, that the plaintiff was a *fictitious* person, may have been very material to show bad faith or fraud in *Ash*, in prosecuting the note. That was a question, however, which should have been submitted to the jury. The probability raised by the evidence, that the plaintiff was fictitious, could not, properly, have been made the ground of a nonsuit. If it had been competent, under any circumstances, to call upon the plaintiff to prove who and what he was, that also was an inquiry for the jury. *Prima facie*, undoubtedly the plaintiff is to be deemed a real person, and whether the evidence showed him to be otherwise, was not for the court to determine. In any point of view, therefore, it seems to me that the nonsuit ought not to have been granted.

*Nonsuit set aside, and new trial granted.*

[T. S. Mitchell, Atty for the pif. J. R. Whiting, Atty for the deft.]

*Note.*—Upon the second trial of this cause, the facts proved did not differ materially from those established at the first trial, except that it clearly appeared that *Ash* paid no value for the note when he received it of *Hart*; but there was some evidence to show that the latter had advanced to *Hickox* 130 dollars when it was delivered to him; and the plaintiff's counsel contended, that he had a right to recover of the defendant to that amount. The Chief Justice, before whom the cause was tried, charged the jury, that the defence set up, was not sufficient to protect the defendant, unless they should be of opinion that the note was *fraudulently* negotiated by *Hickox*, and taken by *Hart* with notice of the fraud. That if they believed that *Hart* had made an advance upon the note *bona fide*, they would be warranted in finding a verdict for the plaintiff to the amount of that advance.

The jury found a verdict for the defendant, and the court afterwards refused to *set it aside*.

They observed that it was a well settled rule, that if a note is put into circulation fraudulently, no person can maintain a suit upon it, who has not paid a valuable consideration for it, in ignorance of the fraud. That the facts of the case had all been presented fairly to the jury, who had passed upon them, and that under the circumstances of the case the verdict ought not to be disturbed.

Mr. M'Corm, for the plaintiff, cited 5 *Barn. & Ald.* 674, and 4 *Cow. R.* 567., as to the acquiescence of the defendant in the passing of the note.

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Mr. Whiting, *contra*, cited 7 Cow. R. 176. 10 J. R. 231. 15 J. R. 270.

As to the acquiescence of the defendant in the passing of the note, the court observed that there was no evidence of an advance upon it by Ash, after the bond of Hart was received by the defendant, and that that branch of the defence could not therefore be sustained.

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1829.

Rogers  
v.  
The Niagara  
Ins. Co. of  
New-York.

EDWARD N. ROGERS, GEORGE S. ROGERS and SAMUEL

ROGERS

versus

The NIAGARA INSURANCE COMPANY of New-York.

To an action upon a policy of insurance, the defendant pleaded the general issue and three special pleas in bar. The plaintiffs took issue upon the three first pleas, but demurred to the fourth. Upon the argument of the demurrer, the court gave judgment in favor of the defendants, with leave to the plaintiffs to withdraw their demurrer and take issue upon the plea. The plaintiffs, however, under the advice of counsel, went to trial upon the issue joined upon the three first pleas, taking no notice of the fourth plea, and the defendants entered up the judgment in their favor upon the demurrer.

At the trial of the cause upon the issues under the three first pleas, the presiding Judge decided that the *fourth* plea covered the whole cause of action exhibited in the first count of the declaration; and as that plea had been decided to be good, and the plaintiffs had permitted the defendants to enter up their judgment upon it, he excluded all the testimony offered to support the count, and the plaintiffs were compelled to submit to a verdict against them.

Upon application to the court, setting forth that all the proceedings in the case had been under the advice of counsel, who supposed that the plaintiffs could proceed to trial under the other issues, without any embarrassment from the fourth plea, and the determination of the demurrer to it,—the court, notwithstanding the intervention of three terms between the rendition of the judgment on the demurrer and the verdict, set the verdict aside, upon the condition that the plaintiffs should pay all the costs which had accrued, and take issue upon the fourth plea without delay.

This was a motion to set aside a verdict in favor of the defendants, and for leave to amend the plaintiff's pleadings by filing a replication to the defendant's fourth plea. The facts of the case will sufficiently appear on reference to the preceding mar-

Dec. Term, 1829. ginal abstract, and to the report of the proceedings upon the demurrer. [*Ante p. 86.*]

Rogers

The Niagara Insur. Co. of New-York.

Mr. Geo. Sullivan, in behalf of the plaintiffs, now read an affidavit, setting forth the facts of the case, wherein it was stated that all the proceedings in relation to the trial upon the issues, under the three first pleas, and the neglect to take issue upon the fourth plea after the determination of the demurrer, had been by mistake, and under a misapprehension of the law. That the counsel for the plaintiffs had supposed, notwithstanding the determination of the issue in law, that they could proceed to try the questions presented by the issues of fact, without any reference to the fourth plea, or the decision of the court upon it.

Mr. G. Griffin and Mr. Jay, *contra*, for the defendants, insisted, that the court could not, after the intervention of three terms between the rendition of the judgment on the demurrer and the verdict, interpose for the plaintiffs' relief. They insisted that application for leave to amend should have been made at the first term after the rendition of the judgment; or, if opportunity presented, during the same term. [They cited 1 *Dunlap's Pract.* 524. 1 *Burr.* 316. 321. 2 *Ib.* 749. 1 *Saud.* 80. (*n. 1.*) 18 *J. R.* 28. 30. 2 *John. Cas.* 284. 1 *Sellon* 379. 3 *John. Cas.* 300.

*Per Curiam.* The court have power to grant the relief here sought, notwithstanding the lapse of time, if the facts of the case warrant their interposition. In the strictness of practice, the plaintiffs would be too late in their application. They should have amended their pleading, by replying to the fourth plea without delay. Several terms elapsed between the rendition of the judgment on the demurrer and the trial of the cause, and they may be considered as having elected not to amend. But strict practice, in this case, might "entangle justice in a net of form" without affording any particular advantage to the defendants.

The proceedings of the plaintiffs were all under the special advice of counsel, who supposed that they might disregard the judgment on the issue in law, and still try the issues of fact presented by the other pleas. In this they were clearly mistaken.

The fourth plea covered the whole cause of action, and a judgment in favor of the defendants, on a demurrer to it, was conclusive. The mistake was committed by the counsel; and upon the whole case, we think that the purposes of justice will be best subserved by setting aside the verdict and permitting the plaintiffs to amend their pleading. The defendants will not suffer in their rights by this course, as the plaintiffs must take issue upon the fourth plea without delay, and pay all the costs which have accrued up to this time.

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1830.

Van Buskirk  
v.  
Purinton and  
Collins.

*Motion granted.*

[A. G. Rogers, Atty for the plf's. G. W. Strong, Atty for the def's.]

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LAWRENCE VAN BUSKIRK

versus

EARL PURINTON, ISRAEL G. COLLINS and EDWARD K. COLLINS.

A conditional sale of goods, accompanied by a delivery thereof to a third person, who is to hold the same, as the agent of the contracting parties, until the terms of sale are complied with, will not vest the property in the purchaser, until the condition precedent is fulfilled.

And where goods purchased conditionally, were put on board a vessel by such agent, with the intent, that when the condition precedent was complied with, the title thereto should vest in the purchaser, who had, by a charter-party, agreed to furnish a cargo for the vessel to proceed to a foreign port; the seller was permitted to reclaim the property out of the hands of the ship owner and master, upon a failure, by the purchaser, to fulfil the precedent condition; although the defendants claimed to have a lien upon the goods for the freight specified in their charter-party.

[See the caption to the next case.]

TROVER for 385 barrels of turpentine. Plea, the general issue. Upon the trial of this cause, it appeared that on the 18th of December, 1828, the defendants, by a charter-party, bearing date on that day, entered into a contract of affreightment with

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one D. H. Robertson and Samuel Candler, whereby they chartered to R. & C. the whole tonnage of the ship *Mary*, (except so much as might be necessary for the accommodation of the crew, &c.) for a voyage from New-York to London and back to New-York. Robertson and Candler, by the terms of the charter-party, were to provide a cargo for the vessel in New-York, together with a return cargo at London; and for the freight thereof were to pay 4000 dollars; "of this sum, *as much as might be wanted* by the defendants, was to be paid in London, *and the balance on the termination* of the voyage in New-York."

Purinton was the master of the vessel, and the other defendants were the agents of the owners, and as such, separately entered into the contract with Robertson and Candler, in their own several names, under seal; whereby they covenanted in the usual form, at their own proper cost and charges, to keep the vessel "tight, stanch and strong, sufficiently manned, and provided with all things necessary for such a voyage," &c.

Robertson and Candler, it appeared, supposed themselves to be, by the contract of affreightment, *the owners of the vessel for the voyage* described in the charter-party; and being unable to purchase the cargo they were to provide, they entered into an arrangement with one Harris Blood, (who was acting as an agent or broker for a Mr. Faber, one of the partners in the house of Collman, Lambert & Co., of London,) whereby it was stipulated that Faber should make an advance of money to Robertson and Candler, sufficient to enable them to pay for a quantity of turpentine to be put on board the vessel as a part of her cargo, upon condition that the turpentine, when purchased, should be consigned to the house of Collman, Lambert & Co., for sale, and Faber furnished with bills of lading therefor, stipulating for its delivery in London, "*freight free*." When these bills of lading were furnished, the turpentine was to become the property of Robertson and Candler, but not before.

Robertson, for the purpose of accomplishing the foregoing objects, made application to the *plaintiff* for the purchase of a part of the turpentine necessary for the cargo, and promised that it should be paid for in cash, whenever it was delivered to Blood.

at the same time referring the plaintiff to him for the particulars of the arrangement. The plaintiff thereupon contracted for the sale of a quantity of turpentine to Robertson and Candler; and it was agreed that the same should become their property when ever it was paid for by Blood; and the plaintiff accordingly delivered to Blood 332 barrels, which were paid for by him, with money received of Faber, and put on board the ship.

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Afterwards the plaintiff delivered to Blood 385 barrels more, (the same for which this suit was brought,) and at the time of the delivery, demanded payment. Blood thereupon called upon Robertson for the bills of lading, stipulating for the delivery of the turpentine, to Collman, Lambert & Co., "freight free," according to the conditions of the agreement. Robertson immediately prepared the bills of lading in the prescribed form, and presented them to Purinton, the master, for his signature; but the master contended that he had a lien upon the turpentine for the freight expressed in his contract, and refused to sign the bills of lading in any way, except as "subject to the conditions of the "charter-party." Robertson communicated this result to Blood, who, by direction of Faber, refused to advance the money to pay for the 385 barrels last mentioned, which had also been put on board the vessel.

The plaintiff thereupon, as Robertson and Candler neglected to pay him, demanded the turpentine of Blood, alleging that it was placed in his hands upon a condition that had not been complied with, and declaring the contract to be rescinded. Robertson and Candler acceded to this claim of the plaintiff; agreed to rescind the contract, and consented that he should receive the turpentine back again. The plaintiff then made a formal demand upon all the defendants for the turpentine, offering at the same time, to pay them the expenses of lading and unlading it; but did not offer to pay the freight or any part of it. The defendants however refused to deliver it up, alleging that they had a lien upon the turpentine for the freight money mentioned in the charter-party. The plaintiff thereupon brought this action to recover the value of the 385 barrels last delivered, and which had not been paid for by Blood.

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At the trial of the cause, the plaintiff, for the purpose of maintaining the issue on his part, called Robertson as a witness, but he was objected to on the part of the defendants, as interested in the event of the suit. The counsel for the plaintiff then stated, that it would appear that the contract between him and Robertson and Candler had been rescinded, whereby R. was exonerated from all responsibility to the plaintiff; and that the interest of the witness was balanced.

The Chief Justice, before whom the cause was tried, decided that Robertson was a competent witness, if it should appear that his contract with the plaintiff had been rescinded; but if it should not so appear, then, that he would not be competent.

The counsel for the defendants excepted to this opinion, and Robertson being sworn, stated the facts which have already been set forth.

Blood was also examined, and he testified, that when the turpentine was put on board the vessel, he *took receipts for each parcel in his own name*, as it was put on board: and he corroborated the testimony given by Robertson in all its essential particulars.

The counsel for the defendants offered no evidence on their part to support their defence, but insisted that the plaintiff was not entitled to recover; first, because the proof did not show a conversion by *all* the defendants; and secondly, because the defendants had a lien on the turpentine for their freight, and were not bound to surrender up the cargo until their contract had been satisfied.

Upon this state of the case, the Chief Justice being of opinion, that the plaintiff's right of recovery depended entirely upon questions of law, a verdict was taken in his favor of for 920 dollars, subject to the opinion of the court upon a case.

The cause was afterwards argued by *J. Prescott Hall* for the plaintiff, and by *G. Clark* and *W. Slosson* for the defendants.

For the plaintiff it was contended, I. That Robertson was a competent witness.

II. That the proof was sufficient to show a conversion by *all* the defendants; but if not, that that objection was not a sufficient ground of nonsuit. [2 Phil. Evi. 125. 1 M. & S. 588. *Nicoll v. Glensie and others. Com. Dig. Abatement F. 86.*]

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III. That the sale of the turpentine to Robertson and Candler, and the delivery thereof to Blood, were entirely conditional; and the conditions of sale and delivery not having been complied with, the right of property in the turpentine, never vested in Robertson and Candler, but remained in the plaintiff. He had a right, therefore, to resume the possession of his goods. [Kent's Com. vol. 2. 391. *Palmer v. Hand*, 13 John. 434. *Hussey v. Thornton*, 4 Mass. R. 405. *Barrett v. Pritchard*, 2 Pick. R. 512. *Haggerty v. Palmer*, 6 J. C. R. 437. *Marston v. Baldwin*, 17 Mass. 606. *Barrow v. Coles*, 3 Camp. R. 92.]

IV. That there never was any delivery of the turpentine to Robertson and Candler, either actual or constructive. But if by the contract of sale, any right of property vested in them, they relinquished it, and the contract of sale was entirely rescinded, whereby the plaintiff's right to the possession of his goods reverted to him. [Richardson v. Goss, 3 B. & P. 119. *Mills v. Bell*, 2 Ib. 457. *Salte v. Field*, 5 T. R. 211. *Atkin v. Barwick*, 1 Stra. R. 165. *Craven v. Ryder*, 1 Holt's R. 100. 2 Mar. R. 127.]

V. That the defendants had no lien whatever upon the turpentine; but that if they had, it was not sufficient to overreach the plaintiff's claim, nor sufficient to defeat his right to have his goods restored to him. [Birley v. Gladstone, 3 M. & Sel. 205. *Philips v. Robbie*, 15 East. 546. *Curling v. Long*, 1 B. & P. 634. *Holt's Law of Shipping*, vol. 2, 173. *Laws on Charter-Parties*, 117. 139. Kent's Com. vol. 3, 173, 174. 177. *Montague on Lien*, p. 54.]

For the defendants it was contended, I. That the defendants were improperly joined in the action, there being no joint con-

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version proved. That the Collins' were mere commission merchants, acting as agents for the owners of the ship. That they had no control over the property when shipped, and could not be liable for a conversion where they had no possession, or right to dictate to the master. That if there was default anywhere, the master alone was liable, and he alone should have been sued. [1 Com. Dig. 78. 3 Sel. N. P. 1176.]

II. That the freight money agreed upon by the charter-party, was a lien on the goods, and they could not be legally demanded, without a tender of the freight. [Palmer v. Lorillard, 16 J. R. p. 348. Clarkson v. Edes, 4 Cow. R. p. 470. Saville v. Champion, 2 B. & A. 503. Detouches v. Peck, 9 J. R. 210. 15 Ib. 332. Sansom v. Ball, 4 Dall. p. 459.]

III. That no person having goods on board a vessel ready for sea, can reclaim them, or unlade the vessel without paying the freight. That in this case, as the defendants were to receive a large sum in London, they had a lien for that sum on all goods laden on board; and that where freight is payable in advance, it cannot be recovered back. [De Silvale v. Kendall, 4 M. & S. p. 37.] That where there is no default on the part of the ship-owner or his agents, he cannot be deprived of his freight after the goods are once taken on board.

IV. That in this case the goods were laden with the consent of Robertson and Candler. As between them and the plaintiff, the title of the property passed to the purchasers by the delivery; and the defendants' lien stood as it would if Robertson and Candler were the plaintiffs. And that if they had instituted the suit, the defendants' claim would have been clear and undoubted. [Chapman v. Lathrop, 6 Cowen's Rep. 110. Moorey v. Welsh, 8 Ib. 238. 5 D. & E. 291. 5 J. R. 395. Long on Sales, 153.]

*Per Curiam.* The proof in this case shows a conversion by all the defendants. They were all personally bound by the

charter-party. Though the Collins' describe themselves as *agents*, yet they stipulated personally, and are therefore personally bound for the performance of their contract. The defendants all claimed a right to detain the goods, as subject to the charter-party, and they all united in the refusal to deliver them up. The property was as much under the control of the merchants as the master, and they are responsible with him for the act of withholding it, if that would not be justifiable on his part. The action, therefore, is not misconceived in point of form, and if well founded in other respects, may be maintained against all the defendants jointly.

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If this were not so, there would be no ground of *nonsuit* in this branch of the defence. In suits *ex delicto*, the joinder of too many defendants is never objectionable, where the defect is not apparent on the record. One may be acquitted and another found guilty; for a failure of proof against one, does not show that the cause of action, established in evidence, is different from that comprised in the declaration. [Com. Dig. vol. 1. 78.]

If the decision of the cause depended upon a particular examination of the second ground of defence assumed by the counsel for the defendants, we should be inclined to say, that under the charter-party, no lien attached upon the turpentine, even if it were considered as the property of Robinson and Candler. The freight, as such, did not become due until the termination of the voyage at New-York, except so much as might be actually wanted for the expenses of the ship in London; and the lien, in any event, could not exist, except for a due proportion of the freight. The outward cargo could not be bound for the whole amount of the charter money, for it was to be delivered long before the entire sum became due.

But without examining more particularly the questions raised on the argument, as to the *lien* of the owners of the vessel on the goods put on board under the charter-party, or when such right of lien commenced, we think that the evidence shows that the turpentine in question was never put on board *under the charter-party at all*. The sale and delivery by the plaintiff were clearly conditional, and the property was not to vest in Robertson and Candler until the condition was complied with. The

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delivery was to *Blood*, and it is evident that he did not act as the purchase as the agent of Robinson and Candler, but as the agent of *Faber*. The goods were not put on board as the property of Robinson and Candler; *Blood* took a receipt for them in his own name. The whole sale by the plaintiff to *Blood*, and by him to Robinson and Candler, depended on the performance of the condition stipulated for by the latter as to the bills of lading, and on the payment of the money by *Blood*.

The sale and delivery being thus conditional, it is well settled, that the property never passed out of the plaintiff, unless the condition was performed. [13 J. R. 434. 6 J. C. R. 437.] It is immaterial therefore, to consider what may have been the rights of the defendants, to retain property put on board by Robinson and Candler, under the charter-party. It is quite clear, that they had no such right as against the plaintiff, who never intended that his property should go on board the ship at all, unless he received payment for it.

On the supposition that by the delivery, the property vested in *Blood*, without payment for it, it is very clear, that it did not pass from *Blood* to Robinson and Candler. The sale as to them, was strictly conditional, and whatever interest may have vested in *Blood*, was restored to the plaintiff, by the agreement to rescind the whole contract of sale.

*Judgment for the plaintiff.*

[D. P. Hall, att'y for the plff. G. Clark, att'y for the defn.]

**LEONARD COLLMAN, Joseph LAMBERT, CONRAD W. FABER and  
HERMAN STOLTERFOHT**

**versus**

**ISRAEL G. COLLINS and EDWARD K. COLLINS.**

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A mistake in the declaration, as to the Christian name of a plaintiff, is not a ground of nonsuit at the trial; and such mistake cannot be taken advantage of, except by a plea in abatement.

A conditional sale of property, accompanied by a delivery of it to a third person, who is to hold the same, as the common agent of the contracting parties, until the terms of sale are complied with, will not vest the title to the property in the purchaser, until the condition precedent is fulfilled.

The plaintiffs, through B., an agent, agreed with R. & C., to advance a sum of money sufficient to cover the first cost of a quantity of turpentine, upon condition, that the turpentine, when purchased, should be shipped and consigned to them at London, "freight free," by the bills of lading: R. & C. acceded to the terms, and a quantity of turpentine was purchased by B., the agent, and R., one of the contracting parties, and put on board a ship which R. & C. had chartered of the defendants for a voyage to London and back. It was agreed between B., the agent, and R. & C., that the turpentine should not become the property of the latter, until they had produced bills of lading therefor, signed "freight free;" and upon these conditions, B., the agent, paid for the turpentine, with money received of the plaintiffs; put it on board the ship, taking receipts therefor in his own name. The master of the vessel, with the approbation of the defendants, refused to sign bills of lading for the turpentine, "freight free," contending that they had a lien on it for the freight money mentioned in the charter-party. The contemplated voyage was, by this means, broken up, and the defendants took the turpentine out of the vessel and sold it.

HELD, that R. & C., not having complied with the condition upon which the turpentine was to become theirs, had no title to the property; and as the plaintiffs had paid for the turpentine and received possession of it through B., the agent, they were entitled to maintain trover for the conversion of it by the defendants.

HELD, also, that the turpentine, under the circumstances of the case, was not put on board the ship under the charter-party, and that the defendants, therefore, had no lien on the property for their freight.

TROVER, to recover of the defendants the value of 332 barrels of turpentine. This cause, and the preceding one of *Van Buskirk v. Purinton* and these defendants, originated in the same transaction; and to avoid unnecessary repetition, as well as

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for a more correct understanding of the facts connected therewith, reference may be had to that case.

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The cause was tried before Mr. Justice Oakley, and at the trial, Blood was called as a witness by the plaintiffs. He testified, that in the early part of the month of December, 1829, he was informed by D. H. Robertson, that he was negotiating for the charter of the ship Mary, for a voyage from New-York to London and back, and his assistance in procuring a cargo for her was desired. That he suggested to Robertson the plan of shipping a quantity of turpentine to London, and told him that he (the witness) could, as he thought, procure an advance of money upon certain terms, by which the cargo might be purchased. Robertson yielded to the suggestion, and agreed to purchase 1500 barrels upon the terms proposed.

Blood then called upon Faber, one of the plaintiffs in this cause, who resided in New-York, and one of the firm of Collman, Lambert & Co., of London, to know whether he would advance the funds necessary for the purchase; and Faber finally agreed to make such advance, upon condition that the turpentine should be shipped, when procured, to C. L. & Co., at London, and consigned to them "freight free," by the bills of lading. This proposition being communicated to R., was assented to by him, and he then informed Blood that he had already contracted with Van Buskirk, and with Mitchell & Bleecker, of New-York, for the purchase of two parcels of turpentine, which they were expecting to receive from North Carolina, and that he had referred them to him (Blood) as the broker in the transaction, who would pay for the turpentine on its delivery.

When the turpentine was received, Mitchell & Bleecker gave notice of its arrival to Blood, and afterwards delivered to him the 332 barrels in question, he having agreed to pay for them on delivery. Blood put the turpentine on board the ship, and took receipts therefor in his own name.

As soon as the turpentine was delivered, M. & B. sent their bill for it to Blood, who paid the amount with money received by him of Faber for that purpose.

Blood further testified, that he acted in the transaction as the agent both for Faber and Robertson: that he was to receive and keep possession of the turpentine in *his own name*, until Robertson's agreement was complied with; and the turpentine was not to become the property of Robertson until the bills of lading stipulating for its delivery, "freight free," to C. L. & Co. were procured.

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After the turpentine was put on board the ship, Blood called upon the defendants, and upon Purinton, the master, for the bills of lading, which had been stipulated for with Robertson; but the master, with the approbation of the defendants, refused to sign any, *unless made subject to the charter-party*. Blood then made various propositions to the defendants and the master, and finally offered to accept bills of lading, filled up at the current rate of freight between New-York and London. All these propositions were rejected, and Blood then, by the direction of Faber and in the name of the plaintiffs, demanded of the defendants, and also of the master, the 322 barrels of turpentine in question; but they refused to deliver them up, insisting that *they had a lien upon them for the freight specified in the charter-party*.

The *defendants* afterwards took the turpentine out of the ship and sold it, without the consent of any of the other parties having a claim upon it, or an interest therein.

It also appeared from the testimony of Mitchell, (who was called as a witness by the *defendants*.) that Blood had communicated to him, before the turpentine arrived from North Carolina, the fact that Faber was to advance the money for it, under an arrangement made with Robertson for that purpose. But the *agreement as to the purchase* was made with Robertson, and the bills for the turpentine were made out in *his name*, and sent to Blood for payment. All the circumstances, however, relating to the manner in which the turpentine was to be paid for, were understood by Mitchell & Bleeker, while it was in the possession of Blood, and before payment was received by them.

The plaintiffs, in the course of the trial, for the purpose of

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showing who composed the house of Collman, Lambert & Co., and for the purpose of showing a joint interest in themselves, called one of their clerks as a witness: and it appeared by his testimony, that the individuals associated in that firm, were Leonard Collman, John Lambert, Conrad William Faber and Herman Stolterfoht. The witness also stated that there were several brothers bearing the name of *Lambert*, but no person by the name of *Joseph Lambert* was known to him.

The counsel for the defendants, upon these facts, moved for a nonsuit, upon the ground, first, that the house of Collman, Lambert & Co., was not composed of *these* plaintiffs; *Joseph Lambert*, being the person named in the declaration, whereas *John* was the actual partner.

Secondly, because the plaintiffs had failed to show any title to the property in themselves. This motion was overruled by the presiding Judge, and the counsel for the defendants excepted to his opinion.

The defendants on their part then gave the charter-party in evidence, for the purpose of showing their right to detain the turpentine, and called the mate of the ship as a witness. He testified that after the turpentine was sent on board, Robertson and Candler came to the vessel and gave several directions relative to it, and appeared to be, so far as the witness observed, its real owners; no other person seemed to have any interest in it, and he supposed the turpentine had been sent on board by them. The master refused to sign the bills of lading because they contained the clause "freight free," and the captain intimated to the person who presented them, that, if he signed such bills, he might be prevented from receiving his freight. No other cargo, except the turpentine and a small quantity of peppermint, was put on board the ship, although she continued ready to receive it until the 23d of January; when the witness understood that Robertson and Candler had refused to furnish any more cargo, and had abandoned the voyage. The turpentine was then taken out of the ship by the defendants.

The witness signed the receipts for the turpentine in the name

of Blood, who delivered the turpentine to him, but he did not know that Blood was the agent of the plaintiffs, or that he had any interest in the transaction of any kind.

After the value of the turpentine had been shown, and all the facts were ascertained, the counsel for the defendants again moved for a nonsuit; but the motion was denied by the presiding Judge, who recommended that a verdict should be taken in favor of the plaintiffs, subject to the opinion of the court upon a case to be made. This being assented to by the counsel for both parties, the jury returned a verdict in favor of the plaintiffs for seven hundred and ninety dollars and sixty-one cents damages, and six cents costs.

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The cause was now argued by *J. Prescott Hall*, for the plaintiffs, and by *Mr. G. Clark* and *Mr. Slosson*, for the defendants.

For the plaintiffs it was contended, I. That the mistake in the Christian name of the plaintiff, Lambert, was no ground of nonsuit, and that such mistake could only be taken advantage of by plea in abatement. [6 *Mau. & Sel.* 45. 2 *Brod. & Bing.* 34. 1 *Bos. & Pul.* p. 40, 645. 1 *Saunders on Plead. & Ev.* p. 11. 1 *Chit. Plead.* 441. *Com. Dig.* vol. 1, p. 61. *Abatement*, c. 19. f. 18. 4 *Cow. R.* 157. *Arch. Prac.* 305. 1 *Tidd's Prac.* 452. The counsel for the defendants assented to the correctness of this proposition, on the argument, and all objections upon this point were waived by them.]

II. That the turpentine in question having been paid for by the plaintiffs, and delivered to their agent, Blood, under an express condition that it should not become the property of Robertson and Candler until they produced the bills of lading, stipulating for its delivery to the plaintiffs at London, "freight free;" neither Robertson and Candler, nor the defendants, could have any claim to hold the property against the rights of the plaintiffs, until the condition precedent on the part of Robertson and Candler was fulfilled. [*Kent's Com.* vol. 2, 391. *Hussey v. Thorn-*

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*ton, 4 Mass. R. 405. Barrett v. Pritchard, 2 Pick. R. 512. Haggerty v. Palmer, 6 J. C. R. 427. Marston v. Baldwin, 17 Mass. R. 606. Barrow v. Coles, 3 Camp. Rep. 92. 19 Vesey, 235.]*

III. That the plaintiffs having paid for the turpentine under the conditions aforesaid, and having taken the same into their own possession by their agent, Blood, acquired either a general or a special property in the turpentine, which was not divested by putting the same on board the ship.

IV. That as between the plaintiffs and Robertson and Candler, the latter could have no right to the turpentine, until they produced the bills of lading signed "freight free;" no right of property or possession, therefore, ever vested in Robertson and Candler, but the same remained in the plaintiffs.

That the plaintiffs, at all events, were entitled to the possession of the property in pursuance of the agreement between Robertson and Blood, the agent of the plaintiffs. Until the bills of lading were produced signed "freight free," the property was not to vest in Robertson and Candler, and being out of Mitchell & Bleecher, it of course remained in the plaintiffs. Robertson and Candler being wholly unable to comply with the terms of their contract with the plaintiffs, the latter were entitled to retain the possession of the property against Robertson and Candler, and all other persons.

V. That the plaintiffs never contracted with the defendants, nor with the master of the ship, for the conveyance of the goods to London. When, therefore, the voyage was broken up, the plaintiffs had a right to reclaim the turpentine; and at most, were only chargeable with the expenses of loading and unloading the same. They were not bound to tender any thing to the defendants, both because the latter claimed to hold the turpentine as an indemnity for their charter-party with Robertson and Candler, and because the plaintiffs offered to pay the defendants and the master of the vessel, the customary freight on the goods to London.

VI. That the selling of the turpentine on the part of the defendants, without notice to any of the parties in interest, was a conversion thereof. The plaintiffs never parted with the possession of the property. When it was delivered on board the ship, and receipts therefor were taken in the name of Blood, it was but a delivery to themselves, or their order, Blood being the agent of the plaintiffs for this purpose.

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VII. Robertson and Candler never interposed any claim to the turpentine, and did not pretend that they had any interest therein, or that there ever was any delivery of it to them, either actual or constructive. If they ever had any interest in the property, they relinquished it in favor of the plaintiffs, who became entitled to the possession. [Richardson v. Goss, 3 B. & P. p. 119. Mills v. Ball, 2 B. & P. p. 457. Salte v. Field, 5 T. R. p. 211. Atkins v. Barwicke, 1 Str. Rep. 165. 1 Holt's N. P. Rep. p. 100. Craven v. Ryder, 2 Marshall's Rep. p. 127.]

VIII. That the purposes for which the turpentine was put on board the vessel having been defeated by the acts of the defendants, or the acts of the defendants and the master, the plaintiffs had a right to the possession of the property. That being refused by the defendants, they were liable to the plaintiffs in this action for the value of the property.

IX. That the defendants had no lien whatever upon the turpentine; but if they had, it was not sufficient to overreach the claims of the plaintiffs, nor to defeat their right to have the property restored to them. [Birley v. Gladstone, 3 M. & S. 205. Philips v. Rodie, 15 East. 546. Curling v. Long, 1 B. & P. 634. Holt's Law of Shipping, vol. 2, 178. Laws on Charter-Party, 117, 139. Kent's Com. vol. 3. p. 173, 174, 177. Montague on Lien, p. 54.]

*Mr. G. Clark and Mr. Slosson, for the defendants. I. The plaintiffs never purchased the goods in question, and have no*

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property therein, which will enable them to sustain the action of trover. The circumstances of this case differ from those of the previous one, in which Van Buskirk was plaintiff. There the property was originally in Van Buskirk, and he made a conditional sale of it; but here Robertson himself was the purchaser; he made the contract with Mitchell & Bleecker, who made out the bill of parcels in his name. That the money to pay the amount of the bill was to be advanced by Faber, could make no difference as to the question of *title*, for the property was never, under any circumstances, to become his. He made but one condition at the time of the advance, namely, that the turpentine should be consigned to his house; but the money was to be a loan to Robertson, for which security was to be given by him, on property which he was to purchase in his own behalf.

The plaintiffs in order to sustain their action must show either a general or a special property in the turpentine; but all the testimony shows the general title to be in Robertson and Candler; while the special property, (if any there was,) vested in Blood. He was not authorized to advance the money of the plaintiffs, until the proper bills of lading were produced, and if he exceeded his authority, that might be the plaintiffs' misfortune, but it conferred upon them no title.

There were two contracts in this case, one between Robertson and Mitchell & Bleecker, the other between Robertson and Faber, through Blood. By the former, the turpentine was sold to Robertson and Candler, to be paid for on delivery. That condition was complied with, the money was paid, and the title to the property, therefore, vested in Robertson and Candler. It passed out of Mitchell & Bleecker, whose claims were satisfied; it did not vest in the plaintiffs, for they made no contract for it, and were not purchasers; it must, therefore, have become vested in Robertson and Candler. If the property had been destroyed by fire or other accident, the loss would have been theirs; they had a right to insure it, and were to all intents the legal owners. The plaintiffs were merely commission merchants, making an advance of money, upon the faith of a consignment, which was to have been made to them, but which had

never reached their hands. For their disappointment they can have an action against Robertson and Candler, but have no claim upon the property.

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II. The goods were put on board the ship with full knowledge by all the parties, of the existence of the charter-party, and the owners had a lien for freight.

III. Robertson and Candler, by the terms of the charter-party, became so far interested in the vessel, that a delivery on board of her was a delivery to them. By such delivery the whole title vested in the purchasers, and could not be divested to the prejudice of any third person having a claim upon the property. [6 *Cow. R. 110. 2 Mason's Rep. 236.*]

Faber had a full knowledge of the charter-party, and so had Mitchell & Bleecker. The latter knew of no condition as between Blood and the purchasers, that the property was not to become theirs, until the bills of lading were produced "freight free." The delivery was absolute, the contract of sale was unconditional, except that it was to be a cash sale; and if the money had not been advanced by Faber, Mitchell & Bleecker could not have reclaimed their property. The reason is obvious, they had delivered it to the purchasers on board of their ship, and had delivered it without condition, although they expected to receive the money from Blood. Where the delivery is absolute the property passes to the purchaser, and the only remedy of the vendor is personal against the purchaser.

The *plaintiffs* at all events have no title. If the delivery was conditional to Blood, then the special property vested in him, while the general property remained in Robertson and Candler. Under no aspect of the case can the plaintiffs claim title, and they cannot, therefore, maintain this suit. [Upon the question of lien, the counsel for the defendants relied upon their former propositions and arguments.]

OAKLEY, J. The point raised at the trial, on the ground of a  
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mistake in the Christian name of one of the plaintiffs, was abandoned on the argument. The cases clearly show, that such a mistake can be taken advantage of, only by a plea in abatement. [1 Chit. Plead. 460. 2 Brod. & Bing. 34.]

The principal question involved in the cause is, whether the plaintiffs have shown property in themselves, so as to be enabled to maintain the action of trover.

It is quite clear, that the property in the turpentine, was not vested in Robertson and Candler. The proof is explicit, that it was not to become theirs, except on the condition that they furnished bills of lading to the plaintiffs, "freight free," and in the meantime the possession was to remain with *Blood*. This condition not having been performed, nothing passed to them by the delivery of the articles on board of the ship. The delivery, in fact, was not to them, even nominally. The receipts taken in the name of *Blood*, preserved the possession in him, and the owners of the vessel were bound to account to him, according to the tenor of those receipts. *Blood* still retained the control of the property. [*Craven v. Ryder*, 6 Taun. 433.]

The property having passed out of Mitchell & Bleecker, the former owners, vested either in the plaintiffs, or in *Blood*. Now it is clearly proved that *Blood* acted as the agent of the plaintiffs, who advanced the money for the purchase. It is, I presume, well settled, that when a purchase is made by an agent, the property vests, by the act of purchase in the principal, and this, even when the agent does not disclose his agency; and in such a case, the principal may always maintain an action in his own name. [*Wallis v. Murray*, decided in this court.] The possession of *Blood* was, therefore, the possession of the plaintiffs—the receipts taken by him, on the delivery of the turpentine on board, will enure to their benefit; and if *Blood*, under the circumstances, could maintain the action of trover, I can see no reason why the plaintiffs cannot.

The other questions involved in this cause were considered in the previous case of *Van Buskirk v. these defendants*. The property here, as in that case, was never intended to be put on board the ship as the property of Robertson and Candler, or

under the charter-party. We then held, that a conditional delivery of the property on board did not vest it in Robertson and Candler, or subject it to any lien of the ship's owners. The principle of that case, seems to me, to apply fully to the present.

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*Judgment for the plaintiffs.*

[D. P. Hall, *Att'y for the plff.* G. Clark, *Att'y for the defts.*]

HENRY KNEELAND

versus

NEHEMIAH ROGERS, SAMUEL ROGERS and EDWIN N. ROGERS.

A contract, made as an indemnity against the consequences of an illegal or immoral act, *to be done at a future period*, is void, on principles of public policy: but a person may indemnify himself by contract, against the consequences of an unlawful act, *already done*.

The declaration, in this case, contained seven special counts, the second of which set forth, that an action had been commenced against the plaintiff, relative to a sale of cotton, made by him as the agent and factor of certain persons residing in Alabama, who were liable to indemnify the plaintiff against the consequences of such sale: and that the defendants, in consideration of a sum of money paid to them by the plaintiff, at the request of his principals in Alabama, promised to indemnify him against said action. It then averred that a judgment had been recovered against the plaintiff, the amount of which he had been compelled to pay, and that the defendants had never indemnified him, &c.

The defendants pleaded the general issue to the whole declaration, and *four special pleas* to the first seven counts, alleging, in substance, that the judgment complained of, was obtained upon the ground, that in the sale of the cotton, the plaintiff had been guilty of *fraud*. Upon demurrer to these pleas, it was HELD, that there was nothing unlawful in the contract set forth in the declaration, and that the pleas were no answer to the second count.

This was a special action on the case, in *assumpsit*. The declaration contained eight counts; seven of which were special, and set forth the plaintiff's cause of action in va-

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rious ways ; the last was general, for money paid, money lent and advanced, money had and received, &c.

The first count alleged, that the defendants were merchants and co-partners in trade, transacting their business at the city of New-York, under the name of N. Rogers & Sons. That the plaintiff, on the 20th day of Sept., 1821, had in his hands 124 bales of cotton, belonging to certain persons carrying on trade and commerce at Huntsville, in Alabama, under the name of L. Morgan & Sons, to be sold by the plaintiff as their agent and factor, and for their account and benefit. That the plaintiff, on the day and year aforesaid, as the agent and factor of Morgan & Sons, sold and delivered said cotton to one James Andrews, of Boston, for the consideration of \$4993 and 92 cents, paid to the plaintiff. That Andrews, in the month of Oct., 1821, commenced an action against the plaintiff, in the Supreme Court of the State of New-York, to recover damages in the sale of said cotton, upon the ground that the bulk of it did not correspond with its *samples*. That in the month of August, 1822, while said suit was pending, Morgan & Sons, being desirous of withdrawing from the hands of the plaintiff the sum of 463 dollars and 31 cents, part of the proceeds of said cotton, (which the plaintiff held to indemnify himself against said suit,) and of paying over the same to the defendants, to be retained by them as the consideration for their promise and undertaking hereinafter specified, for the purpose of inducing the plaintiff to deliver up said last mentioned sum, that it might be so paid over to the defendants, addressed a letter to them of the tenor following, viz :

“ New-York, August the 5th, 1822.

“ Messrs. N. Rogers & Sons,

“ Gentlemen,—A suit has lately been commenced in the Supreme Court of this State, by James Andrews, of Boston, “against Henry Kneeland, of this city, relative to a sale heretofore made by Mr. Kneeland to Mr. Andrews, of a parcel of “cotton, then belonging to us ; in which suit the plaintiff has laid “his damages at \$2500. The sale having been made for our “account, we are of course liable for any damages that may be

" recovered in the suit ; and being desirous of providing a full  
 " indemnity in this respect, to Mr. Kneeland, we hereby autho-  
 " rize and request you to pay to him all such sums of money as  
 " he may be required to pay, as well for any damages that shall  
 " happen to be recovered against him in the suit abovemention-  
 " ed, or otherwise, in relation to the sale of said cotton, as also  
 " all costs and charges to which he may necessarily be put in  
 " that behalf ; including reasonable counsel fees to the counsel  
 " to be by him employed in relation to the said business. Your  
 " advances to Mr. Kneeland for the above, to be made from  
 " time to time, as the occasion may require ; or otherwise at his  
 " election. By complying with this request, and charging your  
 " advances to our account, you will oblige your obedient ser-  
 " vants, *L. Morgan & Sons.*"

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That the defendants, upon the presentment of said letter to them, endorsed a memorandum on the back thereof, in the words following, viz : " We will promptly comply with the requests of " Messrs. L. Morgan & Sons, as contained in the within order. - " New-York, August 5th, 1822. *N. Rogers & Son.*"

The plaintiff then averred, that the said order and endorsement were delivered to him on the day and year aforesaid, and that thereupon he paid over to L. Morgan & Sons the said sum of 463 dollars and 31 cents, which they, on the same day, paid over to the defendants, who received the same as the consideration of their said promise and undertaking. That afterwards, at the May Term of the said Supreme Court, in the year 1827, the said James Andrews recovered judgment against the plaintiff in the aforesaid suit, for the sum of 1648 dollars and 98 cents as damages ; which said sum, together with 131 dollars and 49 cents, for costs, and 350 dollars for counsel fees in said suit, the plaintiff had been compelled to pay : of all which the defendants had notice. By reason of which premises, and by force and effect of the said memorandum, signed by the defendants, they became liable to pay to the plaintiff the said several sums of money ; and in consideration thereof, undertook and promised to pay the same to the plaintiff, &c.

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The second count set forth, the pendency of the suit by Andrews against Kneeland, the liability of Morgan & Sons to save the plaintiff harmless from all its consequences, and their desire to provide a full indemnity for him. That the defendants, on the same 5th day of August, 1822, in consideration of the sum of \$468 31 cents, paid to them by the plaintiff, at the special instance and request of Morgan & Sons, undertook and faithfully promised the plaintiff, that they would pay to him all such sums of money as might be required to satisfy the damages which might be recovered against him in said suit, and all costs and charges to which he might necessarily be put in that behalf: and that such advances should be made, from time to time, as occasion might require. It then set forth the recovery of the judgment by Andrews; the satisfaction thereof by the plaintiff; his costs and charges; notice to the defendants; and concluded by averring that the defendants, not regarding their promise and undertaking last aforesaid, had deceived and defrauded the plaintiff in this; that though often requested to refund to the plaintiff the said sums of money, they had wholly neglected and refused to do so, &c.

The other five special counts, set forth the contract, founded upon the same facts, in various ways; but as the opinion of the court in reference to the pleadings involved in the cause is confined to the second count, it is not deemed necessary to describe the other counts more particularly.

The defendants pleaded the general issue to the whole declaration, and four special pleas to the first seven counts.

The first special plea alleged that the plaintiff ought not to maintain his action, because in the sale of the said cotton to Andrews, the parcels exhibited as samples, were *superior in quality to the bulk thereof*.

The second set forth, that the plaintiff conducted the sale of said cotton so *negligently and improperly*, that thereby the action of Andrews against the plaintiff accrued, and judgment was obtained against him.

The third plea alleged that the sale of said cotton was con-

*ducted fraudulently* by the plaintiff, and that thereby the cause of action accrued to Andrews, and judgment was obtained against him, &c.

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The fourth plea alleged, that the plaintiff ought not to recover, because, by the *record of the judgment* in said action, it appears that judgment was awarded to Andrews against the plaintiff, for the cause that, in the sale of said cotton, the plaintiff *deceived* and *defrauded* Andrews, &c.

To each of these pleas, there was a separate, general demur-  
rer; and the cause was argued by *Mr. George Griffen* for the plaintiff, and by *Mr. George Sullivan* for the defendants.

*Mr. Griffen.* I. Where parties are competent to contract, and the contract is not rendered void or voidable by statute, and is not *per se* against public policy or good morals, the non-per-  
formance of it can never be excused.

An act, *already done*, however improper in itself, if it involve no moral turpitude, may be the subject of a valid indemnity to the party during the wrong. The qualification voluntarily conceded, is unnecessary, the rule of law being, that "it is a good "condition to save me harmless, from all the ill things *I have* "done, for that is no encouragement for me to do any more ill "actions; but you are not to save me harmless, from all the ill "actions that *I shall do*, for that is an encouragement to do evil, "which is against the law."—[*Hackett v. Tilley*, 11 Mod. R. 93. *Same case 5th Vin. Abridg.* 96, in margin. *Doty v. Wilson*, 14 John. 378. *Given v. Driggs*, 1 Caine's, 450. *Farmer v. Russell*, 1 Bos. & Pul. 296.]

II. The nature and extent of the misconduct and fraud of the plaintiff, in effecting the sale to Andrews, as referred to in the last three special pleas are not disclosed. The breach of every declaration in *assumpsit*, when fully expressed, alleges both fraud and misconduct; viz., *that the defendant contrived and fraudulently intended, craftily and subtly to deceive and defraud the plaintiff*. This allegation is abundantly sufficient to satisfy the averment in those pleas, and would, upon the principle which

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1839. they assert, defeat a recovery on the guaranty in every possible case.

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III. The defendants by their guaranty, assume the place of Morgan & Sons, and the latter, in express terms, admit their liability to indemnify the plaintiff. (See the letter addressed by them to the defendants, set forth in *hoc verba*, in the first count of the declaration.) The pleas, therefore, should avoid the liability of L. Morgan & Sons, and make that the ground of exonerating the defendants.

IV. At the time the guaranty was given, the sale to Andrews had been made, and his suit against Kneeland was then pending. Admitting, for the sake of the argument, that the guaranty may be avoided, yet it must be by matter either accruing, or at least discovered after the giving of the guaranty ; yet none of the pleas advance any such pretensions, but rely exclusively upon matters existing antecedently to the giving of the guaranty ; nor is it pretended that these matters were subsequently discovered.

Mr. Sullivan for the defendants. From the letter of Morgan & Sons, to the defendants, which is spread upon the first count of the declaration, it appears, that they, supposing themselves to be liable for the consequences of Kneeland's acts, relative to the sale of the cotton, requested the defendants to indemnify him for whatever sums he might be compelled to pay to Andrews. Upon the back of this letter the defendants endorsed a promise to comply with the request of Morgan & Sons. Upon this state of facts the defendants are not liable, for the promise contained in the letter, was not an *absolute* undertaking, but an *overture* of guaranty ; and the plaintiff should have *notified* the defendants, that he relied upon the letter, if he intended thereby to bind them. This, he has never done, and the defendants are not responsible upon the memorandum.

But suppose the writing to be a guaranty ; the liability of the defendants, cannot be extended beyond that of *their principals*,

and *they* may avail themselves of every defence which might be set up by them, if they were defendants. Morgan & Sons, could not be liable to the plaintiff, for the consequences of his own fraud, for they were wholly ignorant of his acts. They could not, in any event be made liable to him, unless upon the ground of an express promise, made with a full knowledge of all the facts.

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II. There was no *consideration* for the defendant's promise. The supposed responsibility of Morgan & Sons, is no consideration, for they were not liable to the plaintiff. Their mere request, directed to the defendants, was not a consideration sufficient to support the promise, unless the plaintiff thereby sustained some loss, or suffered some injury. [*Leonard v. Vredenburgh*, 8 John. 39, the second class of cases as there discriminated by C. J. Kent.] It cannot be pretended here, that the plaintiff was injured by this request, or the promise of the defendants to comply with it; for, at most, he merely surrendered up, in consequence of the promise, the sum of \$463 31 cents, which he could not lawfully withhold.

If the defendants are liable to the plaintiff, Morgan & Sons are also liable, for the former are the mere agents of the latter. But Morgan & Sons are not liable, both because of the plaintiff's fraud, and from the retention of their money by him. The consideration arising from the \$463 31 cents, may be thrown entirely out of the question, for that was money belonging to Morgan & Sons, which the plaintiff had no right to retain. The *only* consideration in the case, therefore, is that contained in the letter. But, upon the face of the letter, no consideration appears, as moving between the plaintiff and defendants; and as the defendants' contract was reduced to writing, no consideration, inconsistent with that contained in the writing, can be set up. There was no *privity* between the defendants and the plaintiff, in the transactions out of which this action arose; and no consideration of benefit to the defendants, or of injury incurred by the plaintiff, at the *request of the defendants*, ever passed between the parties.

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But the declaration is bad: I. Because there is no averment of a delivery of the supposed written agreement to the plaintiff, or to any person for him.

II. Because the contract of the defendants, as stated in the declaration being clearly a promise to pay the debt of Morgan & Sons, is within the statute of frauds, and there is no allegation that the promise was *in writing*. This is a fatal defect, and the case of *Fish v. Hutchinson*, [2 Wils. 94,] is directly in point. [See also *Leonard v. Vredenburgh*, 8 John. 39.] The defendants might have demurred for this cause, and judgment must have passed in their favor.

*Mr. Griffen*, in reply. It is stated as an objection to the plaintiff's right of recovery, that it does not appear that the money received by the plaintiff, for the sale of the cotton, has ever been paid over to Messrs. Morgan & Sons. There is no averment, it is said, of that fact in the declaration, and therefore the legal presumption is, that the plaintiff still retains the money. In an action against *third persons*, it is not necessary to allege that fact; and it would be surplusage if it were averred.

But it appears from the letter of Morgan & Sons, which is spread upon the first count of the declaration, that the balance due them, *has actually been paid over* by the plaintiff, and the court therefore can take judicial notice of that fact.

The counsel for the defendants is mistaken, in supposing that there is no averment of the delivery of the letter and memorandum to the plaintiff, for it is directly alleged in the first count of the declaration. It *need* not have been averred, however, nor is it necessary at the trial to prove the delivery.

The defendants' agreement is not within the statute of frauds: it is an original undertaking for a new and distinct consideration, passing between the newly contracting parties. Morgan & Sons are not liable upon *this* contract, however they may stand as to any other distinct liability. The law upon this subject is well settled; [4 Cowen's R. 432;] and it is also estab-

blished, as an acknowledged rule of pleading, that in *declaring* upon a collateral undertaking, you need not aver that the promise was in writing. If the undertaking be collateral, and the defendant pleads that the promise was not in writing, then the plaintiff must reply, setting forth the writing.

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**OAKLEY, J.** This is a special action on the case. The declaration contains eight counts, the last of which is general. The defendants plead the general issue to the whole declaration, and to the seven first counts, interpose four special pleas: to these pleas there is a general and separate demurrer.

The second count in the declaration substantially sets forth, that an action had been commenced against the plaintiff by one Andrews, in the Supreme Court of the State of New-York, relative to a sale of cotton made to him by the plaintiff, as agent and factor of Morgan & Sons, merchants, residing in Alabama. That Morgan & Sons were liable to indemnify the plaintiff against said action, and that the defendants, in consideration of a sum of money paid by the plaintiff to them, at the request of Morgan & Sons, promised to indemnify him against the action of *Andrews*. The count then avers that *Andrews* obtained a judgment against the plaintiff, and that he had been obliged to pay, &c.; and that the defendants had not indemnified him. The statement of the plaintiff's cause of action is varied in the other special counts, but for the purpose of disposing of the present question, it is not deemed material to notice them more particularly.

The fourth and fifth pleas of the defendants are in substance, that the judgment of *Andrews* against the plaintiff was obtained on the ground, that in the sale of the cotton the plaintiff had been guilty of fraud.

The question intended to be raised by these pleas is, whether a party, who has been guilty of a fraudulent act in the sale of property as the agent of another, can make a valid contract with a stranger for an indemnity against the consequences of such fraudulent act.

It is well settled, that any contract made for the purpose

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of indemnifying a man against an illegal or immoral act, to be done at a future period, is void on principles of public policy. But it is also settled, that a party may indemnify himself against the consequences of any unlawful act already done. [*Haskett v. Tilley*, 11 Mod. 98. 1 Com. on Con. 30.] Thus it has been held, that a bond given to a sheriff, to indemnify him against a voluntary escape, which has already happened, is valid, [1 *Caines*, 450. 14 J. 378,] although such bond would be clearly void, if given to save the sheriff harmless against an escape thereafter to be permitted.

The present case seems to me, to fall within this principle. The plaintiff had already been prosecuted for the alleged fraud in the sale of the cotton. I see no reason why the defendants might not stipulate for a valid consideration, to indemnify him against that action. Such a contract has no tendency to encourage the commission of illegal or fraudulent acts, and does not seem to conflict with any principle of public policy.

It was contended, on the argument, that though the pleas might be bad, yet that the declaration was defective, inasmuch as it set forth a contract within the statute of frauds, but did not show that such contract was in writing. This objection has clearly no application to the second count, as that is founded on an original contract between the plaintiff and defendants, for a consideration moving directly between them. And if it seem otherwise, it is settled, that when the plaintiff counts on a contract, which is clearly collateral and within the statute, he need not aver it to be in writing. It is sufficient if that fact appears in evidence. [4 *John. R.* 237.]

The fourth and fifth pleas are, according to this view of the case, no answer to the second count in the declaration.

The second and third pleas are clearly bad. They charge the plaintiff with no fraud. The third plea avers that in the sale of the cotton he was guilty of negligence, and the second does not amount even to that. It cannot be questioned, that a party may make a valid contract for indemnity against any past negligence.

The special pleas of the defendants being pleaded to the seven

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first counts of the declaration, and being no answer to one of them, must be entirely overruled; and there must be judgment generally for the plaintiff, on the demurrers.

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*Judgment for the plaintiff, with leave, &c.*

[G. W. Strong, Atty for the plff. A. G. Rogers, Atty for the defd.]

NICHOLAS M. DELONGUEMARE

versus

The TRADESMEN'S INSURANCE COMPANY in the City of N. York.

A description of buildings to be insured, filed in the office of an Insurance Company, and referred to in the policy in general terms, as a report of the situation of the premises, is not to be considered as incorporated into the policy, or as amounting to a warranty that the premises insured, shall conform, in all respects, to the description referred to. Buildings represented as finished, in an application for insurance, must correspond substantially with such representation; for a material misrepresentation avoids the policy.

13 Wend. 92

A carpenter, employed constantly in a china factory, in making the racks, shelves, &c., necessary for the proper conducting of the business therein, is not to be considered as a "carpenter at work in his own shop," within the meaning of the memorandum as to the classes of hazards and rates of premiums, attached to the policy; and the employment of such a workman by the plaintiff, in the ordinary and necessary business of his manufactory, was held not to avoid his policy. The plaintiff was also allowed interest on the amount insured from the time the loss became payable, according to the terms of the policy.

This was an action upon a policy of insurance against fire, for one year, dated the 9th day of January, 1827, and expressed in the following terms:

"The Tradesmen's Insurance Company in the City of New-York, by this policy of insurance, in consideration of thirty-three dollars, to them paid, by the insured hereinafter named, "the receipt whereof is hereby acknowledged, do insure N. M. DeLonguemare, of the city of New-York, against loss or damage by fire, to the amount of three thousand dollars, on the

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|------------------------|--------------------------------------------------------------------|
| <u>Dec. Term,</u>      | " following buildings, occupied as a china factory, and on ma-     |
| <u>1829.</u>           | " chinery, tools, horses and stock, finished and unfinished, con-  |
| <u>Delancey-street</u> | " tained therein, situate in said city, in Lewis-street, 100 feet  |
| <u>v.</u>              | " from Delancey-street, <i>per Eagle policy, No. 17,158, viz.:</i> |
| <u>The Trades-</u>     | " On building marked pr. survey No. 1, \$550, and                  |
| <u>men's Ins. Co.</u>  | " \$700 on property contained therein . . . \$1250                 |
|                        | " On building marked pr. survey No. 2, \$675, and                  |
|                        | " \$500 on property contained therein . . . 1175                   |
|                        | " On building marked pr. survey No. 3, \$150, and                  |
|                        | " \$125 on property contained therein, . . . 275                   |
|                        | " On building marked pr. survey No. 4, \$50, and                   |
|                        | " \$50 on property contained therein, . . . 100                    |
|                        | " On building marked pr. survey No. 5, \$62 50,                    |
|                        | " and \$125 on property contained therein, . . . 187 50            |
|                        | " On building marked pr. survey No. 6, \$12 50, . . . 12 50        |
|                        | " \$3000                                                           |

" It is understood that further insurance is effected in the  
 " Eagle, North River and Phoenix offices, *as described in report*  
 " *No. 5306, filed in the office of the Eagle Company.*"

The policy in its form was like those in common use in the city of New-York, and contained the ordinary stipulation, that in case the buildings insured should, after the making of the policy and during the time it would otherwise continue in force, "be appropriated, applied or used, to or for the purpose of carrying on, or exercising therein, any trade, business or vocation, described as hazardous or extra-hazardous, as specified in the memorandum of special rates, in the proposals annexed to the policy, unless otherwise specially provided for, in the policy, or agreed to by the corporation, in writing, to be added to, or endorsed on the policy, then and from thenceforth, so long as the same should be so appropriated, applied or used, the policy should cease, and be of no force or effect."

In the "classes of hazards and rates of annual premiums" attached to the policy, "coach-makers, cabinet-makers, and carpenters in their own shops, or in buildings erecting or repairing" and "all manufactories requiring the use of fire heat," are

classed among the "trades and occupations" deemed *extra-hazardous*, and on which a premium of 25 cents and upwards per \$100, was charged in addition to the premiums specified for the other classes of hazards.

The declaration contained two counts upon the policy in the ordinary form, together with the common counts for money.

The defendants pleaded the general issue, and gave notice that they would offer evidence at the trial, to show that the policy was made upon the representation of the plaintiff, and that he, at the time of making it, had *misrepresented* the true situation, description and value of the property and the business to be conducted and carried on in the buildings insured : and further, that the plaintiff had violated the conditions and articles mentioned in the policy, and accompanying the same.

The first "condition of insurance" attached to the policy, declares that "applications for insurance on property *out of the city of New-York*, shall be in writing, and specify the construction and materials of the building to be insured ; by whom occupied; whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings, and their construction and materials; whether any manufactory is carried on within or about it; and in case of goods and merchandise, whether or not they are of the description denominated *hazardous or extra-hazardous*. And if any person insuring any building or goods in this office, shall describe the same otherwise than as they really are, so that the same be insured at less than the rate of premium specified in the printed proposals of the company, such insurance shall be void and of no effect."

The cause was tried twice, and each time before Mr. Justice Oakley. At the first trial the plaintiff proved the policy, and produced his preliminary proofs of interest and loss, which the defendants admitted to be sufficient, and that they were furnished on the 14th of September, 1827, the fire having taking place on the 27th of July, following. The plaintiff then called witnesses to prove the value of the property covered by the policy, the extent of his loss, and the condition of the premises, both at

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the date of the insurance, and at the time of the fire. It appeared from this testimony, that the buildings in question, were *substantially*, but not perfectly finished at the date of the policy. That two carpenters were afterwards employed for different periods of time, in hanging the interior doors, making moulds, and in putting up shelves for the manufactory; and that one was kept constantly employed from the date of the policy, up to the time of the fire, in doing such work as the establishment required.

The plaintiff then called the president of the "Eagle Fire Company" as a witness, who produced two surveys or reports from the files of his office, one of which (a small one) was furnished to that company by the plaintiff, at the time of his application to them for insurance; the other, as the witness thought, was a plan made by the surveyor of the Eagle Company.

Upon the *smaller* survey, and by a memorandum upon the back of it, the purposes to which each particular building was to be appropriated, were pointed out; and building No. 1 was divided into five different apartments, one of which was designated as a "*store for painted ware*." In this apartment, the carpenter kept his work bench and tools; but it never had been used as "*a store for painted ware*." The *large* survey showed the situation of the different buildings in relation to the streets, and in relation to each other, but did not point out the particular purposes to which any part of building No. 1 was to be appropriated.

Upon this state of the evidence, the counsel for the defendant moved for a nonsuit, upon the ground that there was a *carpenter's shop* upon the premises, and that carpenters were at work, making improvements thereon, from the date of the policy up to the time of the fire, without the consent of the defendants first obtained in writing, according to the stipulations in the policy, and that the policy therefore never attached.

The motion was overruled by the presiding Judge, and the defendants then called a number of witnesses, to show the condition of the buildings insured, and that they were not *finished* at the date of the policy.

The plaintiff to rebut this testimony, produced evidence to show that a carpenter was a workman necessary to a china manufactory, and that such a workman is usually kept in constant employment therein. It appeared also, that the fire did not originate in the apartment occupied by the carpenter, but commenced in the "drying oven," about thirty or forty feet from that room.

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Upon these facts a verdict was taken for the plaintiff for 3157 dollars, subject to the opinion of the court upon a case to be made.

Afterwards, upon the argument of the case, the defendants contended, I. That the policy *never attached* on account of the *imperfect description of the property*, and the concealment of the fact at the time of effecting the policy, *that the buildings were unfinished, and that carpenters were at work therein.* [6 Cow. 676. 1 Mar. on In. 464. Ib. 453. 457. 4 Mass. Rep. 337. 2 Kent's Com. 383. 3 Dal. 491. 3 Dow. 262. 1 John. Cas. 8. 2 Caines' Rep. 57. 2 Mar. Rep. 46. 1 John. Rep. 345.] That the report filed in the office of the Eagle Company, was to be taken as a part of the policy, being tantamount to a warranty that the buildings should conform to the description; and that every warranty is a condition precedent to the plaintiff's right of recovery. [1 Doug. 11. Cowp. 785. Phil. 125. 1 Peters' Cir. Court. R. 416. 2 John. Cas. 333. Juhel v. Church. 1 Dall. 162. Ogden v. Ash.]

II. That if the policy ever attached, *it was suspended during the continuance of the carpenter's work;* and as the evidence showed that carpenters were at work on the buildings, from the time of the effecting of the insurance *to the time of the fire*, that the policy was not, at the time of the fire, binding on the company.

III. That *parol* evidence was inadmissible, to show that at the time of the effecting of the insurance, the buildings were described as unfinished, varying thereby *the description from the policy;* or if admissible, that no such evidence was given.

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IV. That evidence as to *the usage of trade*, that carpenters were necessary to a porcelain factory was *inadmissible*, inasmuch as the policy contained *an express clause* that carpenters should not be employed on the premises, unless that risk was specially paid for, and endorsed on the policy. [3 *John. Cas.* 1. 1 *John. Rep.* 433. 2 *Caines*, 155. 1 *Marsh on In.* 474. 1 *Caines' Rep.* 44. 1 *Stark on Ev.* 1039.]

V. That if such evidence was admissible it was unavailable, as the carpenters, from the time of the making of the policy up to the time of the fire, were not in fact employed in matters merely incidental to the manufactory, but in finishing the buildings.

The *plaintiff* on the other hand insisted, I. That at the time of the effecting of the insurance, he made a true representation to the defendants of the value, situation, and description of his property, and of the business to be carried on in the buildings insured, and did not after the insurance, and before the loss, violate any of the conditions of insurance, contained in or annexed to the policy. [*Park. on In. ch.* 2. 1 *Marshall*, 474.]

II. That at the time of the effecting of the insurance, the buildings insured were erected agreeably to the endorsements contained on the back of the survey.

III. That the premium paid by the plaintiff to the defendants, was the highest rate of premium specified in the conditions of insurance annexed to the policy, to which an addition of twelve and a half cents per \$100, was made, being the usual allowance for what is called the carpenters' risk. [*Phil. on In.* 105. 1 *Mau. & Sel.* 10. 7 *East.* 457.]

IV. That the buildings insured were not, during the continuance of the risk, appropriated, applied to, or used for, any trade, business or occupation, not authorized by the policy, or the usage of the business expressed in the policy.

V. That the verdict of the jury was correct, and agreeable to the law and the evidence, and that the plaintiff was entitled to interest, from the time of presenting his preliminary proofs.

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Upon this case and this argument, the court gave judgment for the plaintiff; but afterwards, by an arrangement between the parties, a new trial was granted for the purpose of submitting the questions of fact to a jury. The evidence upon the second trial, did not differ materially from that produced at the first trial.

The plaintiff, on his part, called one Lewis Decasse as a witness, and as there was no controversy about the preliminary proofs, he was examined in chief, merely as to the condition and value of the property insured, the interest of the plaintiff therein, and the facts connected with the destruction of the buildings by fire.

On his cross-examination, however, the smaller plan or survey being shown to him, he testified, that he *believed*, that it was a survey which had been furnished by the plaintiff to the Eagle Fire Insurance Company, at the time when he effected his insurance on said buildings, in the office of the Eagle Company, as mentioned in their policy. By this plan it appeared, that the building designated thereon as "*number one*," was divided into several apartments, one of which was marked, "store for painted ware;" and on the back of the survey there was a memorandum, stating that the first floor of building No. 1, was *used as* a painting room, an office, a laboratory for the preparation of colors, a store-room for the finished ware, and a painting kiln. The room for painted ware, at the time the policy was effected in the office of the defendants, contained a carpenter's work-bench, materials and tools; and a carpenter was constantly at work in the same, in making moulds and tables, and in putting up shelves for the use of the manufactory, from the time when the policy was effected, down to the day preceding the fire. The apartment had never been used as a "store for painted "ware" at any time; but it appeared from the testimony of witnesses, that a carpenter was a necessary workman in a china

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manufactory, and that such a workman is usually employed therein at all times.

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The plaintiff having rested his cause upon this state of facts, the counsel for the defendants, moved for a nonsuit, but the motion was overruled by the presiding Judge, and an exception taken to his opinion.

The defendants then introduced testimony to prove that the buildings described in the policy were not *finished* at the time the policy was effected, and the plaintiff, on his part, called a number of witnesses to rebut such evidence. It appeared, during the progress of the trial, that the fire did not originate in the apartment occupied by the carpenter, but commenced in the "drying oven," which was about thirty or forty feet distant from the room for the painted ware. It also further appeared, that the defendants had caused the premises to be inspected by their own surveyors, previously to the effecting of the insurance: and there was also a *large* plan or survey of the buildings in their possession, on which no mention was made of the particular purposes to which any apartment, or building was to be appropriated. It did not distinctly appear by whom this *survey* was made, and there was some doubt as to which of the plans the defendants intended to refer when they executed the policy. The plaintiff contended, that the large plan was prepared by the surveyor of the company, and that the defendants relied upon that survey; but the defendants insisted that the small one, on file in the Eagle office was the only one known to them in making their contract.

Upon this testimony the Judge charged the jury, that by the policy in question, the buildings insured, were to be considered as *finished* at the time when the policy was effected; and if they should find that they were not *substantially* finished at that time, then that their verdict should be for the defendants, whether the description contained in the *plan* were considered as a warranty strictly, or merely as a representation. But if they should find that the buildings were finished at the time of the insurance, the next question for consideration would be, whether the evidence

showed that there was a carpenter's shop in the building, within the meaning and intent of the conditions annexed to the policy, either at the time of the insurance or at the time of the fire. If there was, then that the defendants were entitled to a verdict : but if there was not, then that the jury were to consider, whether the situation of the room in the building, marked as number one on the plan, (and in which the carpenter worked,) as described by the witnesses, was such a material variation from the description of that room contained in the plan, as was calculated to induce the defendants to insure the premises at a less premium than that taken. If so, that the defendants were entitled to a verdict : if otherwise, they were to find a verdict in favor of the plaintiff. The Judge also decided that the *description* of the room in building No. 1, contained in the plan referred to in the policy, as being a room for painted ware, was not a *warranty* in the literal sense of the word, and did not affect the policy, unless it was *material to the risk*, as before stated.

To this opinion and charge, the counsel for the defendants excepted, and insisted that the facts disclosed by the evidence were an absolute bar to the plaintiff's action.

The jury returned a verdict in favor of the plaintiff for 3248 dollars.

The defendants now moved for a new trial; and relied upon the following points in support of their motion.

I. That the description of the buildings contained in the plans or surveys, furnished to the defendants by the plaintiff at the time of effecting the insurance, made part of the policy, and was a warranty on the part of the plaintiff, that the buildings insured were such as they were represented to be on the plans, and that they were used, and to be used, for such purposes only as were designated by the surveys.

II. That the occupying of the store for painted ware, in building No. 1, as a carpenter's shop, (the apartment being in fact not occupied as a store for painted ware at the time the insurance was effected,) was a breach of the warranty ; and that the policy

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III. If the description of the manner in which the buildings were occupied was not a warranty, it was a *representation*; and as the store-room for painted ware was not occupied for any such purpose at the time of effecting the insurance, but was occupied as a carpenter's shop, there was a material misrepresentation; the policy never attached, and the Judge should have nonsuited the plaintiff for this cause.

IV. The Judge erred in deciding that the plan or survey, referred to in the policy, and forming part of it, was not a warranty that the buildings insured, and the purposes for which they were occupied, should conform to such plan.

The cause was argued by *Mr. J. W. Gerard* and *Mr. Hugh Maxwell* for the defendants, and by *Mr. Ogden Hoffman* and *Mr. Charles Graham* for the plaintiff.

The counsel for the defendants contended, that it appeared from the testimony, that the survey referred to was not made by the defendants, but was furnished to them by the plaintiff himself; and, therefore, that it entered into and became a part of the policy.

That as the survey stated the various rooms in building No. one, to be, at the time the insurance was effected, occupied in a particular manner, it was tantamount to a *warranty* that they were thus occupied, and that they should continue to be so during the continuance of the risk. [*Phil. on In.* 125. and the cases there cited.]

The underwriter (they said) has no means of protecting himself from an improper use which may be made of a building insured, but by holding the assured strictly to the terms of his contract. Every engagement on his part becomes a condition precedent, and if the underwriter can show that such condition has not been complied with, the assured cannot recover.

It is not contended, that *every* collateral paper referred to in

a policy, enters into the contract ; but if the policy itself refer to another paper, it will be considered, *prima facia*, as adopted by both parties. The contracting parties *may* adopt a collateral paper, and if they refer to one which is *essential to the contract*, it will enter into and form part of it.

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There are two ways by which a warranty may be made in a policy ; one is by express terms in the policy itself, and the other by direct reference. [Con. Mar. 451. 3 Stark on Ev. 1162.] A mere description, *dehors* the policy itself, may not be a warranty, although it be essential to the contract, and if the assurers act upon it, it may also be considered as forming a part of the agreement.

But if the description be contained in the policy, it will amount to a warranty. [Fowler v. The *Aetna Fire Ins. Co.*, 6 Cow. Rep. 673.] This case contains a principle important to the defence ; for what line of distinction can be drawn between a description and a representation which governs the policy ?

It is admitted, that a description introduced into a Marine Policy, amounts to a warranty, and the Supreme Court have decided, that there is no difference in this particular, between a marine and a fire policy, and further, that the parties must be held to their agreement strictly. [See also 3 Dow. 255.] In this case, the matters upon which the defendants relied, should not have been put to the jury, for there was nothing proper for them to pass upon, except the mere question, as to whether the buildings were finished or not. The grounds of the defence, were matters of law upon facts, which were admitted by both parties, and the Judge should therefore have nonsuited the plaintiff.

For the *plaintiff* it was contended, I. That the plan of the premises insured, delivered to the Eagle Company, was not a warranty, that the apartments in the various buildings should conform to the plan, as to the purposes for which they were to be used.

II. That even if the plan of the premises, was considered as a warranty, still that the buildings insured were not, during the

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continuance of the risk, appropriated to, or used for any trade, business or occupation, not authorized by the policy, or the usage of the business expressed in it; and, therefore, that there was no violation of the contract.

III. That the Judge correctly left it to the jury, as a question of fact, whether the buildings insured were finished at the date of the policy; and also whether the buildings were, during the continuance of the risk, appropriated to, or used for any purpose not authorized by the policy, or the usage of the business expressed therein.

It is not pretended (said the counsel) that there is any express warranty contained in the policy, upon which the defendants can rely, and they therefore seek to invoke into it, another paper which is not necessarily, or naturally connected with it.

In the first place it is by no means clear, that the plan referred to, was furnished by the plaintiff, or that he had any connection with it. It only appears by the testimony of the witness, that in his belief, the survey was one which was furnished to the Eagle Company by the plaintiff, and there is no evidence, which shows that the plaintiff ever alluded to that survey in his contract with the defendants. They have referred in their policy, to a report on file in the Eagle office, but there is nothing in the evidence to connect that report with the plaintiff, or his present contract.

But even if this fact were as the defendants represent it to be, it would not sustain their positions, for no paper, *dehors* the policy itself, can amount to a warranty. The survey in this case is a mere representation, not a warranty, and the company have said in the conditions of insurance attached to their policy, that a misdescription will not vitiate the contract, unless it be material to the risk.

It has been decided in England, that a written paper, although folded up in the policy, would not amount to a warranty; [*Pawson v. Ewer, Doug. 11. n. 3. p. 12. n. 4.*] and the same cases show that where a paper was attached to the policy by a wafer, its power was not thereby extended. The warranty, if there be one, must appear upon the face of the po-

licy, and in the case of *Higgins v. Dow*, (13 Mass. Rep. 96,) the court rejected a paper which was signed by the assured and left with the underwriters by him, and would not allow it to be treated as a warranty. If the warranty be in the policy it is sufficient; and Lord Mansfield said, in the case of *Bean v. Stupart*, (*Doug.* 11,) that if it appear upon the face of the contract, how or where it appears, is of no consequence.

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The dictum in *Phillips*, (p. 125,) relied upon by the counsel for the defendants, is not supported by the authorities he cites. He refers to 1 *H. B.* 254, and the 6th of *Term R.* 710. But an examination of those cases will show, that the learned author has no warrant for his conclusions. The question submitted to the court in those cases was, whether in *settling a loss*, the *proposals* of the assurers could be referred to; and the court decided that they might, not for the purpose of showing a warranty, or representation, but for the purpose of ascertaining whether the loss might not be settled by the proposals. In England, the policy expressly provides that the assurers shall pay according to their proposals, and of course there can be no method of settling a loss there, except by referring to the proposals. Another instrument may be referred to for the purpose of explaining the meaning of the parties, where it is not clear upon the face of the contract; but no paper *dehors* the policy, can be introduced for the purpose of creating a warranty.

In *Harris v. The Eagle Fire Company*, (5 *John. R.* 368,) there was a memorandum upon the back of the policy, describing 385 kegs of tobacco, as the property insured. This specific tobacco was taken away and other kegs were put in its place. If this was a warranty, then the policy was at an end when the first tobacco was taken away; and yet the plaintiff was allowed to recover for the loss of the substituted tobacco.

In the cases cited from the 6th of *Cowen's Reports*, and from the 3d of *Dow*, there was an express warranty upon the face of the policies, and nobody doubts that such a contract must be fulfilled. In this case, for instance, the plaintiff has described his buildings to be a china manufactory: this is a warranty that they were such, and the plaintiff was bound to prove, as a con-

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dition precedent to his right of recovery, that the buildings were used for the very purposes described in the policy.

The plaintiff's case is plain, unless the court mean to construe the policy by the most rigorous rules of warranty; for, at the trial, all the facts were satisfactorily established in his favor.

He proved that a carpenter was a necessary workman in a china manufactory, and there are numerous cases to show, that the meaning of particular words may be proved by parol. A carpenter's shop is embraced in the china factory insured, and the plaintiff had an undoubted right to keep a carpenter constantly employed upon the premises, to prepare such things as were necessary in his business.

The main question to be decided, goes back to the point whether the survey, if furnished by the plaintiff to the defendants, is a warranty or representation. If it be the latter, as we contend, then the matter was properly put to jury to say, whether there was any such misrepresentation of the property by the plaintiff as was material to the risk. They have passed upon that fact in his favor; and it now remains for the court to say, whether the designation of the room in building No. one, as a "store for "painted ware," on the plan or survey, amounted to a warranty, that it was then used for that purpose, and that it should never be appropriated to any other during the continuance of the risk.

If this rule is to be adopted, every person carrying on business, to any extent, may be in peril of vitiating his policy by acts which are perfectly innocent in themselves, and which no practical man ever deemed improper.

JONES, C. J. This was an action of *assumpsit* on a policy of insurance, against loss or damage by fire, to a china or porcelain manufactory, in Lewis-street, in the city of New-York.

The policy was in the usual form, insuring the plaintiff, for the term of one year, against loss or damage by fire, to the amount of \$3000, upon the buildings composing the factory, and on the machinery, tools, horses, and stock, finished and unfinished, contained therein.

The destruction and loss of the premises to the plaintiff, by fire, within the year from the date of the policy, was admitted, and the defence is, first, that the buildings were unfinished, and that carpenters were at work upon them at the time of effecting the policy, and that the same, and the unfinished state of the buildings not having been sufficiently described and truly represented to the insurers, the policy never attached. Secondly, that a carpenter's shop was permitted on the premises, up to the time of the fire, without the license or consent of the insurers, and against the express provisions of the policy, whereby the contract of insurance was avoided or suspended. And thirdly, that the actual state of the buildings, at the time of the application for insurance, was misrepresented to the insurers, and the fact of the carpenter's shop therein, concealed from them, whereby they were misled, and the insurance obtained at less than the rate of premium, which, upon a full disclosure of the truth of the case, would have been required for the risk.

Whether the buildings were finished or not, at the time of effecting the insurance upon them, was a question of fact for the jury. It was much litigated at the trial, and the verdict of the jury upon the point was against the defence. We are not dissatisfied with the result. The evidence relied upon to show the unfinished state of the buildings, was the testimony of some of the witnesses, that carpenters were at work on the interior of them, for some time after the date of the policy. But the defendants own witness, on his cross-examination testified, that after the first of January, 1827, very little remained to be done to the buildings, and that he considered them complete. The policy was not effected until the ninth of that month. At that time the manufactory had commenced its business, and the application was for insurance upon it, as an establishment in operation. The surveyor of the Eagle Fire Company, with a view to insurance upon it by that corporation, had inspected and surveyed the premises and had made a report of his survey, to which the policy of that office referred, and which survey and report were adopted by these defendants, after a

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further examination of their own surveyor, to test its accuracy,
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But without dwelling longer on this subject, we are satisfied that the weight of the evidence was in favor of the position, that the buildings were substantially finished before the policy was effected; and that the carpenter who remained in the assured's employ at the time of the fire, was retained, not to complete the buildings, but for the legitimate purposes of the establishment, in the transaction of its business after it went into operation. The finding of the jury was in accordance, therefore, with the evidence before them and it ought not to be disturbed.

The second ground of defence which was taken to the alleged use of an apartment in building No. one, for a carpenter's shop, objected to the appropriation of the room in the premises for the accommodation of the carpenter, as a deviation from the engagements of the assured, and as a violation of the provision of the policy, against unauthorized extra-hazardous risks. It turned chiefly upon questions of law. No evidence was offered by the defendants in support of the fact it affirms, but they contend that the testimony on the part of the plaintiff himself showed that the room in the building number one, which had been designated and described as a store room for painted ware, had been appropriated to the use of the carpenter who remained in their employ, and used by him for his shop from the time of effecting the insurance to the time of the loss. It is admitted that the room in question, at the time the policy was effected, did contain a carpenter's work bench and tools, and that a carpenter was constantly at work there, in making moulds and boxes, and in putting up shelves for the use of the establishment, from the date of the policy to the day preceding the fire, and that the apartment had not at any time been used as a store for painted ware.

But the plaintiff insisted that a carpenter was a necessary workman to be attached to the establishment, and that his employment and accommodation in the buildings insured, were justified by the ordinary requirements of the manufactory and by the usage of the trade, and he denied that such use and occupation of the store-room, by a workman attached to the establishment, was prohibited by the policy, or that he was bound to disclose the circumstance to the insurers, or that his silence in relation to it amounted to deception, or a culpable concealment or misrepresentation in the description he gave of the property and the purposes to which it was applied. Witnesses were called by him to prove that a carpenter was a necessary workman for him to employ in his manufactory, and that such a workman is usually attached to such manufactories, and at all times employed therein.

The bearing of this fact, of the occupation of a part of the

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building by a carpenter, upon the rights of the plaintiff, and the importance to him of the explanation he gives of that occupancy, will be seen in the sequel. But before we can understandingly discuss the merits of this branch of the defence, or the charge of misrepresentation and concealment which it involves, we must look into the contract, and see what the description was which the assured gave of the premises proposed for insurance, and what the obligations were which the contracting parties came under to each other.

The insurance is upon six several buildings, numbered from 1 to 6 inclusive, and together occupied as a china factory, and on machinery, tools, horses and stock, finished and unfinished, contained therein. By one of the printed clauses in the policy, it is declared by the contracting parties, that the policy is made and accepted in reference to the proposals and conditions thereunto annexed, which are to be used and resorted to, in order to explain the rights and obligations of the parties thereto, in all cases not therein otherwise specially provided for. And by the first of the conditions annexed to the policy, it is provided that applications for insurance on property out of the city of New-York, must be in writing, and contain the specifications in and by the said condition set forth and required to be given; and that if any person insuring any buildings or goods in that office, describes the same otherwise than as they really are, so that the same shall be insured at less than the rate of premium specified in the printed proposals of the company, such insurance shall be void and of none effect.

The report No. 5306, referred to by the policy, as filed in the office of the Eagle Company, was produced and proved, and a copy of it is annexed to the case. It describes the buildings, by giving the location and dimensions of them, and the materials where-with they were constructed. And the surveyor by whom the report was made, and who was called as a witness by the defendants, testified that they were, at the time of the survey, occupied and used for the purposes of a china manufactory, as represented by the plaintiff. And on being shown the smaller plan or sketch of the premises, and the endorsement thereon, which constituted or accompanied the plaintiff's application for

insurance, he admitted and declared, that the same contained a true and correct statement of the occupation of the buildings on the 9th of January, 1827, the day of the date of the policy, and that the buildings, as specified in his own report, were complete and finished.

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By the endorsement on the smaller plan, or application for insurance, to which the witness referred, it appears that the description there given of the occupancy of the building No. one, is as follows, to wit, that the first floor was used as a painting room, an office, a laboratory for the preparation of colors, a store room for finished painted ware, and a painting kiln; the second floor as a turning room. In this building, and in the room intended for the receipt of the finished painted ware, the carpenter had his work bench and tools, and was accustomed to work, and the omission to communicate that circumstance to the company, when the application was made for the insurance of the buildings, is the concealment complained of, and the defect in the description, which is relied on as vitiating the contract. With these explanations, we are prepared to consider the form in which the objection is presented to us, and the legal effect it may, in any of its aspects, have upon the rights of the plaintiff. It is chiefly urged as a breach of a warranty, which the description of the apartment, as a store room for "finished ware," is supposed to import. The proposition is, that the description of the buildings in the plans or surveys alleged to have been furnished to the defendants by the plaintiff, at the time of effecting the insurance, was a warranty, on the part of the plaintiff, that the buildings were such, and were used, and to be used for such purposes only as were represented by those plans or surveys, and that the store for painted ware, in building No. one, being in fact not so occupied at the time of effecting the policy, but then being used as a carpenter's shop, was a breach of the warranty, and that the policy, for that reason, never attached.

This objection was made the ground of a motion, at the trial, for a nonsuit; but the motion was denied, and the Judge, in his charge to the jury, instructed them, that the description of the room in the survey referred to by the policy, as being a room for painted ware, was not a warranty in the literal sense of the

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The first and leading question, then, upon this point is, whether the description contained in the report to which the policy refers, was, in judgment of law, a warranty in the literal sense of the term, or a representation. If the report and surveys to which the parties refer, were furnished by the assured to the company, and did describe the room in question as a room for painted ware, and if the description thus given of the room, is to be viewed as a strict warranty by the plaintiff, of equal force and effect as an express formal condition, that it should be used as a store room for painted ware, and for no other purpose, the use of it permitted to the carpenter, however innocent and innoxious it may be, was still a departure from the literal compliance with the engagement which he was bound to observe, and might work a forfeiture of his contract, or in other words, prevent it from attaching. But if it is to be considered as a representation only, and is free from fraud, a substantial compliance will be sufficient, and no deviation or failure will be a defence to the insurers, unless it operate to increase the risk.

Then, was the description of the room contained in the report, or in the application, a warranty, or was it simply a representation of it, as a store room for painted ware? It is a general rule, that a representation, to have the effect of a warranty, must be contained in the deed or writing itself, which creates or manifests the contract of the parties, and must be part of the contract. It derives its title to the strict and literal compliance which is exacted of him who is bound by it, from the consideration of its being a condition precedent, which he assumes upon himself, and which must be complied with, to entitle him to the benefit of the contract, or give him the right to enforce it by action against the insurer. Hence it is, that a substantial compliance is of no avail, but that it must, if affirmative of the existence of a fact, or of the verity of a positive allegation, be literally true, and if prospective, either for the observance of an executory engagement, or the performance of a promise, it must be strictly fulfilled. But to give it this controlling

operation, it must be a part of the contract, and appear on the face of the policy. [Marshall, 349-451. *Pawson v. Watson*, Coup. 785.] So inflexible is this rule, that written instructions for effecting the insurance, (Coup. 785,) a written memorandum inclosed and folded up in the policy, or a slip of paper annexed to the policy, at the time of subscribing it, (Doug. 12,) have been held, not to amount to a warranty.

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In the case before us, the description of the room, which is supposed to represent it as devoted exclusively to the storage or deposit of the finished painted ware, and which is insisted upon as a warranty, does not appear in the policy, but is found in the report of the surveyor, or in the application of the assured, which makes no part of the policy. But it is said that the policy refers to the survey and report for the description of the buildings, and adopts them as part of the contract. The policy does refer to the survey, and it refers also, and much more specially, to the report of the surveyor of the Eagle Company, but it incorporates neither of them into the contract, nor does it refer to them as part of the agreement between the parties. It selects from them, and incorporates into the policy so much and such parts of the description as it was deemed proper to insert therein; and the fair intendment is, that those parts only of the description were agreed to be adopted as part of the contract, and the residue of the report or surveys, if to have any legal effect, to be left on the footing of representation merely. The policy does not declare the report, or the surveys to which it refers, to be parts of the contract, nor does it use any language calculated to impress them with that character. It is not probable that the assured would have assented to any such reference to those documents, with the understanding that they were thereby to become part of the agreement, and a warranty of the truth of the statement they contain to the very letter, on pain of the forfeiture of his insurance. Both the survey and the report are ordinarily the acts of the agents of the insurers, and the statements they contain are the results of the inspection and inquiry of those agents, and not the representations of the assured. His statements are made in his application for insurance, but upon

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these the insurers, where the premises are accessible to their own surveyor, seldom act. It is the duty of their own officer to inspect and examine the property, and to make a report thereon for the government of his principals.

The report and survey, in the present instance, had been made for the Eagle Company, the prior insurers, and were adopted by these defendants. And it appeared in evidence, on the trial, that these defendants themselves, also caused the premises to be inspected by their own surveyor, previously to taking the risk. It further appeared that there were two plans or surveys, a larger and a smaller one, which differed in this unimportant particular, that no mention was made, on the larger survey, of the specific purpose to which any apartment or building was to be appropriated; but that the smaller plan or sketch alone contained the description now relied upon as the warranty. At the first trial, it did not distinctly appear which was the survey of the insurers' agent, or by whom the smaller plan, designating the uses to which the buildings were to be applied, was prepared.

I inclined to the opinion, that the smaller plan, which designated the uses to which the buildings were to be appropriated, and which had the appearance of a sketch merely, and did not resemble a regular survey, was the application of the plaintiff to the Eagle Company for insurance, and not the survey or report made by the surveyor, for the information of the company, to which the policy refers. This opinion was confirmed by the president of the Eagle Company, who, upon his examination as a witness in the cause, testified that the two papers marked 5306, were original surveys or reports belonging to that office; that the first, or smaller one, was brought by the plaintiff, at the time he applied to that office for insurance upon the factory, and that the second paper was, as he believed, a survey of the same premises by the surveyor of the company. If such be the true history of the two papers, it is manifest that the smaller one was the application of the assured, as its whole appearance indicates it to be, and was, in no sense of the term, either a report or survey of the premises, but a mere sketch to show the general location of the several buildings which composed the establishment, and

a designation of the purposes for which they were intended. And upon that view of the subject, the supposed intention of the parties, to refer to that paper, and to adopt its description, will disappear, as the reference is to the report of the surveyor, and not to the application for insurance. But the two plans both come from the files of the Eagle Company, and each is marked with the number 5306, and both may have been before this company when they took the risk and adjusted the premium. Yet, as the reference is to the report, and not to the plaintiff's application, we must look to the report, I apprehend, and not to the application, for the description, which the policy intended to adopt.

But if it can be supposed that the application for insurance, or smaller plan or sketch of the premises, was intended, by the report to which the policy refers, and that the purpose of the reference was to adopt the description, which that plan or sketch contained, and to hold the plaintiff to it, how does it become thereby a warranty on the part of the plaintiff? It will, in its character and legal effect as a representation, be available to the insurers, in its broadest extent, for all beneficial purposes; but by converting it into a warranty, the assured may be inconvenienced, or wholly defeated by some unintentional deviation from the strict letter of the description it contains, without any substantial advantage to the insurer, as respects the risk, from keeping him to such a literal adherence to the words he may happen to employ.

The cases cited by the defendants, it is true, establish the doctrine that a description of the subject of insurance may, when embodied in the policy, amount to a warranty that the subject is such as the policy describes it to be. In all the cases, however, where a warranty has been held to arise from the description of the subject, or the expressions of the parties, that description, or those expressions, have appeared on the face of the policy. No authority has been shown for extending the rule to descriptions or expressions contained in other documents to which the policy may refer; and such an extension of the rule would, I think, be unwarrantable, unless the reference to the collateral writing be such as to clearly make it a part of the contract. It was on this latter ground, that in policies against

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loss by fire, the obligation imposed on the assured by the printed proposals annexed to the policy, to procure the certificate of the minister, or church-wardens and parishioners, of the reality of the loss, and the fairness of the claim, has been held to be a condition precedent to the right of the assured to recover, which cannot be dispensed with, though the certificate be wrongfully withheld; for the policy, in such cases, not only refers to the writing which is attached to it, but the express undertaking of the insurer is to pay the loss according to the exact terms of the printed proposals. They are consequently made a part of the policy.

So the policy, in the case before us, expressly declares that the insurance is made in reference to the proposals and conditions annexed to it, and that the loss is to be paid according to the tenor of the conditions. But the reference in this policy to the surveys and report, is in very different terms, and obviously for very different purposes, and does not profess to adopt either as part of the contract, nor is either of them indispensable to an intelligent and rational construction of the policy.

In the case of *Fowler v. The Aetna Ins. Company*, (6 Ceson, 673,) the description of the subject insured, which was held to be a warranty, was contained in the policy itself, and was, moreover material to the risk. The policy was on the stock in trade of the plaintiff, described as being contained in a two story framed house filled in with brick. It appeared in evidence, that the house was a wooden building with hollow walls, and not filled in with brick. The Judge at the circuit, held the description to be a warranty, but received evidence to show, that the misdescription was a mistake, and not fraudulent; he evidently viewed the constructive warranty, created by the description of the building as qualified, and controlled by the first condition annexed to the policy; and on that hypothesis, charged the jury, that if the description was not made fraudulent for the purpose of obtaining insurance at a reduced rate of premium, but through mistake, the plaintiff was entitled to recover, and a verdict was given accordingly in favor of the plaintiff. It was contended in support of the verdict, that, the description was a

mere matter of representation, and not a warranty. A distinction was taken between marine insurances and those against loss by fire; and it was urged, that marine policies were a peculiar class of contracts, and that their meaning was settled by judicial decisions; but that the construction of policies against loss by fire, must rest on general principles, and that on principle a mere representation could not, because introduced into the contract, be considered a warranty, but that the proposals annexed to this class of policies and made part of them, show the meaning of the parties, and provide substantially that mis-description shall not vitiate, unless it be fraudulent. But the court held, that the description was a warranty, and being a condition precedent, must be fulfilled by the assured, to entitle him to sustain his action on the policy, and negligence, mistake, or mis-representation, would not excuse his failure in the strict performance of the condition, or entitle the plaintiff to recover. The court discountenanced the idea, that a description of property insured by a policy against fire, was to be considered differently from a description in a marine policy, and laid no stress upon the condition in the proposals, to which the plaintiff adverted, as qualifying the warranty created by the description of the building in the policy, in the case before them.

That case then, goes to establish the principle, that a misdescription in the body of the policy will vitiate the contract, whether it be fraudulent or not. But it lends no aid to the proposition, that a description in a report or survey, not incorporated in a policy, nor attached to it, as part of the accompanying instrument, is to be held a warranty, simply because the policy refers to it, as containing a further specification of the property insured.

In the case of the *New Castle Fire Insurance Company, appellants, v. Macmorran & Co., respondents*, on appeal from the Court of Sessions in Scotland, to the House of Lords, (3 Dow. 255,) the insurance was upon a cotton and woollen mill with the machinery, engines, utensils, and stock of cotton and wool therein; and the policy in addition to the description of the mill, contained an express warranty of the following tenor, to wit, "warranted that the above mill is conformable to the first class of cotton and woollen rates de-

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"livered herewith." The class of rates referred to by the policy, was one of a set of classes of hazards and rates of premiums, specified in printed proposals accompanying the policy, and it was shown that besides being referred to, a copy of the proposals was always delivered to the party insuring, with the policy. It appeared, that the premises at the time of the date of the policy, were of the second class, and were not conformable to the first class of rates, and the insurers insisted that the warranty was not complied with, and the contract never had effect. It further appeared, however, that the agent of the company had taken it for granted, that the premises were of the first class, and had made out the policy accordingly, without any representation on the part of the insured. Other matters were also in evidence which may have influenced the opinion of the Court of Sessions, and that court upon a view of the whole case, gave judgment for the assured against the company. The precise grounds of the decision do not appear. But the House of Lords, on the appeal, reversed the judgment on the general ground, that the mill being warranted by the policy as of the first class, but being in reality of the second class and not of the first, the contract never took effect, and that the judgment of the Court of Sessions was clearly erroneous.

In that case the warranty was material, for it appeared that larger premiums would have been required for the insurance of a mill of the second class, as being more hazardous than mills of the first class. But the court laid no stress on that circumstance; they held that the warranty, being a condition precedent, whether it was material to the risk or not, was of no importance. And Lord Chancellor Elden, distinguishing between representations and warranties, stated it, as a first principle of the law of insurance, that a representation is open to inquiry into its materiality, and that if it should not be material, its inaccuracy, or a deviation from the tenor of it, may be excused; but that when there is a warranty, it is a part of the contract that the matter is such, as it is represented to be; and the materiality or immateriality, is, therefore, a matter of indifference, the only question being as to the mere fact which is affirmed or represented to exist. But that case, which so fully carries out

the principle of a literal and strict compliance with a warranty, in no respect relaxes, but in effect confirms the rule, that a representation or assurance, to impress it with the character of a warranty, must be incorporated in the contract, and compose part of the agreement between the parties.

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The warranty upon which the decision of the court turned, was embodied in the policy, and constituted part of the contract. No recurrence was had to extrinsic evidence, or to any collateral document or writing to establish it. The printed proposals to which the policy refers, as delivered with it, was not resorted to or used as proof of the warranty, but as an item of evidence, to show the mere compliance of the warrantor with his engagement, by showing that the mill was not of the class to which it was warranted, by the policy, to belong. It was because the assured had permitted the mill to be represented in the policy, as being conformable to the first class of cotton and woollen rates, and had accepted the contract with that condition in it, that he was held bound to establish the fact without regard to its materiality, and disabled by his own compliance with the condition, notwithstanding the extenuating matters shown in excuse of his failure from enforcing his contract against the company.

In the case of *Higginson v. Dall*, (13 Mass. 96,) a written memorandum signed by the plaintiff, and delivered by his agent to the broker at the time of the application for insurance, stating among other things, that the policy was to take effect if the vessel should sail with a cargo, and no insurance be made by the plaintiff elsewhere, was offered in evidence as a warranty to show that the policy was void in consequence of an insurance made by the plaintiff abroad. The memorandum was not annexed to the policy, nor was the matter it contained, inserted in the contract; but the defendant offered to prove by the broker, that it was kept with the policy, and shown to the several underwriters before they subscribed the contract. The memorandum though objected to as incompetent, was admitted by the Judge at the trial. But the court, when the question came before them, declared themselves to be, all of the opinion, that it ought not to have been admitted, for the purpose for which it was offered. The

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principle of that decision was, that the policy itself is the contract between the parties, and that the proposals, statements and conversations which passed between them, prior to the subscription, are to be considered as waived, if not inserted in the policy. It was admitted, that representations which do not appear on the face of the contract, but are often, though not always, contained in the application for insurance, may, when they are material to the risk, and the object is to falsify them, be proved by oral or written testimony; but it was held that warranties must always be inserted in the policy.

In the case before us, the description of the room in question, as a store room for painted ware, is contained in the application for insurance, or in the report or survey made upon the buildings insured; but it does not appear in the policy itself, nor is the report or survey, or the application containing it, annexed to the policy. It cannot, therefore, be held to be a warranty; but it may, on the general principles of insurance, be taken to be a representation; and, considered in that light, if material and falsified, it will vitiate the insurance.

This brings us to the next branch of the defence, which is, that if the description of the building was not a warranty, it was a representation, and the room in question being represented as a room for the storage or deposit of finished painted ware, and not being so occupied at the time of effecting the insurance, but then being used as a carpenter's shop, and that fact not being communicated to the insurers, there was a material misrepresentation or concealment, and the policy, for that reason, did not attach, and the Judge should, for that cause, have nonsuited the plaintiff.

It is conceded, that a representation, if it be not fraudulent, and does not tend to increase the risk of the insurer, will not avoid the policy, but that it will be sufficient to comply with it in substance, or to show that it has not been departed from, to the material injury of the insurers. I assume that the plaintiff did represent the room, on the smaller plan or survey, which I take to be his application for insurance, as intended for a store room for the reception of the painted ware when finished, and I assume, that this representation, whether the plan in which it appeared was the application for insurance, or a survey of the

building, was before the insurers when they took the risk, and may have entered into their estimate of the rate of premium. And the question on these assumptions will be, whether the occupancy of that room by the carpenter, with his materials and tools, as disclosed by the evidence, did materially falsify the representation and increase the risk of the insurers ?

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The proof of its materiality was upon the underwriters, who make the defence. I discover no evidence in the case to the point; and the failure of proof is decisive against the objection. The risk incurred, by the occupancy of that part of the building by the carpenter, if it in reality did enhance the risk, was susceptible of proof, and it was indispensably necessary to show it, in order to render the defence available. Unless, therefore, the necessity of extrinsic and oral proof of this fact was superseded, or the absence of such proof was supplied by the internal evidence deducible from the policy, or its accompanying conditions of insurance, this ground of defence cannot prevail.

But it may be said, that the standard of materiality of the assured's representations, and the effect of their falsity upon the contract, are settled by the mutual agreement of the parties in the first condition of insurance. The rule there given, is, that if any person insuring any building or goods, describes the same otherwise than as they really are, so that the same shall be insured at less than the rate of premium specified in the printed proposals of the company, such insurance shall be void, and of none effect. The trade or vocation of carpenters, in their own shops, is classed in the printed proposals of the company, amongst the extra-hazardous risks, for which 25 cents and upwards per \$100 is charged, in addition to the premium specified for the class of risks to which the building may belong; but there is no proof that the disclosure, by the applicant, of the fact of the use and occupation of the room by the carpenter, would have exposed him to the charge of a higher premium, or that his silence on that point induced the company to insure the buildings at less than the rate specified as applicable to them in the printed proposals. The rates of premium specified in the printed proposals, range from 22 cents to 75 cents upon \$100, and where the premises are occupied or used

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for trades and vocations, or goods and merchandise, deemed extra-hazardous, 25 cents and upwards are chargeable in addition to these ordinary premiums. Upon turning to this policy, it will be seen that the premium charged on the insurance, is \$1 12 $\frac{1}{2}$  cents upon each \$100, being the highest premium in the whole range of hazards, and 37 $\frac{1}{2}$  cents in addition thereto; but the same proposals contain a memorandum, stating that manufacturing establishments were to be insured at special rates of premium. This insurance is upon a manufacturing establishment, and it consequently comes within the memorandum, and not within either of the enumerated classes of hazards. It was insured at a special rate of premium, and hence it is that we find the assured charged by the policy with a larger premium than that of the highest class of hazards, with the addition of 25 cents per \$100 for extra-hazardous risks.

From these views of the contract, it is fair to conclude, that the parties, in settling the special rate of the premium for this insurance, assumed the establishment to be an extra-hazardous risk, and calculated the rate of premium on that principle; and we have no means of determining whether the disclosure of the fact alleged to have been suppressed or concealed, would have had an influence on the decision or not. The better opinion is, that it would not; for the room was represented as a store for painted china ware when finished, and such ware might, and, as I collect from the evidence, was to stand therein unpacked upon shelves. Now, by the same written proposals of the company, *china*, (the staple commodity of this manufactory,) glass and earthen ware unpacked, and buildings in which the same are packed, are found classed with carpenters in their own shops, as being deemed extra-hazardous, and chargeable with the extra or additional premium of 25 cents and upwards for each \$100 insured thereon. How, then, could it be material to the insurer, whether the building was occupied and used as a carpenter's shop, or as a store room for painted china ware? The china ware, and the carpenter's shop, are alike proscribed as extra-hazardous, and whether the apartment should be occupied by the carpenter's bench and tools, or by the unpacked china ware, could not vary the risk.

Then, does it not follow conclusively, that the representation of the room as a store room for the painted ware of the manufactory, when it was not used for that purpose, but was occupied by the carpenter for his work shop, could not have the effect of causing or procuring the building to be insured at a lower rate of premium than the printed proposals specify for the hazard? And if so, the description given by the assured, of the purpose for which the room was appropriated, and his omission to communicate to the company the circumstance of the occupancy of it by the carpenter, at the time, could not amount to such a culpable misrepresentation, or fraudulent concealment of a material fact, as to avoid the policy or vitiate the contract.

But another view was taken by the insurers of the effect they ascribed to the use of the store room by the carpenter. It was contended that the permission of the assured to him, to occupy the room for his work shop, was an illicit and prohibited appropriation and use of it in contravention of the agreement and provision of the policy against the exercise of extra-hazardous trades or vocations within the buildings insured, without the consent of the insurers, and that the effect of this interdicted use of the premises, was to suspend the policy during the time of its continuance. The agreement and provision of the policy to which the objection refers, is in substance as follows: that is to say, "that in case the buildings "should at any time after the making of the policy, and during "the time it would otherwise continue in force, be appropriated, "applied, or used to or for the purpose of carrying on, or exercising therein any trade, business, or vocation, denominated hazardous or extra-hazardous, as specified in the memorandum of "special rates in the proposals annexed to the policy, unless in the "policy otherwise specially provided for, or thereafter agreed to "by the corporation in writing, to be added to or endorsed upon "the policy, then and from thenceforth, so long as the same shall "be so appropriated, applied or used, those presents should cease, "and be of no force or effect." We have already seen, that in the memorandum of special rates in the proposals attached to the policy, carpenters, in their own shops, are classed among the

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Dec. Term, trades and occupations deemed extra-hazardous, and for the insurance upon which, an extra premium is to be charged. And 1829. .
Delonguemare the defendants insist, that the occupation of the store room, in
v. building No. one, by the carpenter for his shop, was conclusive
The Trades- evidence of the fact, that it was used for the purpose of ex-
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meaning of this prohibitory clause of the policy, without the
assent of the corporation, and therefore caused a suspension of
the policy, which continued until and at the time of the fire.

The answer is, that the carpenter was necessary to the establishment, and his employment and accommodation in the buildings required and justified by his connexion with the manufactory, and by the usage of the trade ; that the insurers were bound to know, and must be intended to have known, the course of business and the usage of trade in such establishments, and that they must have insured the manufactory with such knowledge, and thereby virtually agreed, by the policy itself, that the carpenter should be employed and accommodated in the buildings, as being necessary to the prudential management and successful operation of the factory.

All the witnesses who testify to the point, concur in the opinion that a carpenter is a necessary workman in such establishments. Louis Decasse, one of the plaintiff's witnesses, explains the cause of the retention of the carpenter to have been, the necessity the conductors of the factory were under, to employ him. He states, that it was intended to keep him the year round, and that he, the witness, understands it to be usual to keep such workmen in such factories. Cooley, the defendants' own witness, also testifies to his understanding, that it was necessary and usual for a carpenter to be constantly employed in such an establishment : and *Chanon* testifies fully to the necessity of such a workman in all such manufactories and to the usage on the subject; he says, that in all china factories it is necessary that there should be a carpenter attached to the establishment, and that he should have a place to work in ; that the carpenter is constantly employed in making boxes, shelves, moulds for china, and brick moulds, and repairing such as may require reparation, and is considered as important and necessary

as any other workman to the operations of the manufactory. This proof of the necessity of a carpenter, and of the usage of manufacturers to employ and keep one as an ordinary workman in such an establishment, is not contradicted, and if it was admissible evidence, of which no question is made, it must, we think, be sufficient to take the plaintiff's case out of the operation of the prohibitory clause or provision of the policy, and justify the assured in the use he permitted of the store room in question; for one carpenter only was retained by him, and continued in his employ in the factory at the time of the fire. Such a workman was required for the ordinary purposes of the manufactory, and he must have a place to work in.

A carpenter's shop, therefore, in that sense of the term, was as necessary to the establishment as the painter's shop, or the store for painted ware. The proof is, that a work bench was left for him in the building No. one, and that he was retained and employed, with the intention of establishing him permanently in the manufactory, as a workman attached to the establishment; and such retention and employment being in conformity to the usage, and sanctioned by it, was permissible, unless the policy expressly forbade it; or if the usage was out of the question, yet if the establishment of the carpenter, with his work shop in the building, was necessary to the management and beneficial use and operation of the manufactory, that department would constitute a part, and be allowable as a necessary branch of the factory, and on that ground, would be innocent.

Can it be, then, that the general provision which the policy contains, inhibiting the appropriation of the building to extra-hazardous trades, on the pain of the suspension of the obligation of the insurers, was intended, or is to be construed to apply to an occupation necessarily attached to the establishment, which forms a prominent object of the insurance, and without which, that establishment cannot be advantageously or beneficially carried on? Or must not the restriction be held inapplicable to a trade or vocation, however hazardous, appertaining, or usually attached to an establishment, which the underwriters, with a description of it before them, agreed to insure?

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But again: this provision is one of the printed clauses of the policy, and the memorandum of special rates to which it refers, is part of the standing printed proposals attached to all policies, and is the same in substance and in form, whatever the nature or object of the insurance may be.

These printed forms, calculated as they are for ordinary risks, and containing the provisions and conditions usually attached to insurances upon them, must necessarily be general and comprehensive in their terms, and cannot be adapted to insurances upon other and special hazards. It is the ordinary course of effecting insurances, that upon each application, a special agreement is made between the applicant and the underwriter, designating and describing the premises required to be insured, and settling the terms of that particular insurance, and the policy is then completed by filling up the blank spaces, left for that purpose in the printed form, with suitable words and clauses to express the contract thus agreed upon. This is the usual mode of consummating the contract, and it is the general practice to leave the printed form of the policy unaltered, without expunging or modifying the parts of it which conflict with the written clause.

But these written clauses nevertheless contain the elements of the contract, and being framed under the immediate eye of the parties, and with a reference to the terms of the previous arrangement between them, they not unfrequently present a contract to which some of the printed parts of the policy are inapplicable; and as effect must be given to the acknowledged intention of the parties, they must necessarily supersede or control such of the printed clauses as would, if enforced and literally applied, be inconsistent with them. In this policy a written description is given of the premises insured, which designates and describes the buildings and their contents in general terms as a manufactory of china ware. The agreement is to insure the plaintiff upon a factory of that description in actual operation, and upon the machinery and stock finished and unfinished contained therein. This is a vital part of the contract, and must have its full and entire effect and operation, uncontrolled and untrammelled by the printed parts of the policy. It was

the purpose and design of the memorandum of special rates, to which the policy refers, to enumerate and specify the several trades, business and vocations which were supposed to endanger the safety of the buildings insured, and to entitle the underwriter to a higher rate of premium; and it was the object of the prohibitory clause, to provide that the exercise of those extra-hazardous trades should not be permitted, unless with the assent of the insurers. But that general provision was not adopted, and could not be intended to apply to a trade or vocation, which the policy in terms insures, or by necessary implication permits.

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The written and the printed parts of the policy, when they harmonize, are equally operative and binding upon the parties; but whenever they come into conflict, the written clauses, as expressing the special agreement and declared intention of the parties at the time of the contract, must prevail, and the printed parts of the policy be held subordinate, and be taken and construed in a qualified and restricted sense, so as to confine them to the declared purpose and intention of the parties as expressed in the written clauses. On that principle, the express written agreement of the company to insure a manufactory of china ware in full operation, inserted in this policy, necessarily authorized the exercise of those trades and avocations, in the buildings insured, which appertained to the establishment, and were required for the judicious management and transaction of its accustomed operations and business. It follows, that the general printed clause against the exercise of extra-hazardous trades, must be restricted in its operation, to trades which the conductors of a china factory do not require for the transaction of the ordinary business of the establishment, and cannot be applied to any trade or vocation necessarily or usually attached to such manufactories.

The assured might be restrained from the exercise or toleration of any hazardous or extra-hazardous trade or vocation, within the premises, being itself an independant and separate trade, unconnected with the manufactory insured, and carried on for other purposes distinct from the business of the factory. The restriction might prevent him, for example, from converting the premises into an establishment for the manufacture or storage of

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gunpowder, and perhaps render it unlawful for him to appropriate or use the storeroom, or any other apartment as a work shop, for the purpose of carrying on and exercising therein, the business and avocation of a carpenter, or workman for customers generally, or for the construction of articles in his line for sale. But that provision cannot surely be held to prohibit to the assured the use of any part of the buildings for any purpose or business which composes part of the establishment described in the policy, or is usually attached to and connected with the manufactory agreed to be insured, merely because it is included in the memorandum of special rates as extra-hazardous.

All manufactories requiring the use of fire heat, are, by the same memorandum, denominated extra-hazardous; yet fire heat is the principal agent in the manufacture of china ware; and to deny to the assured the liberty, or right to carry on that manufacture in these buildings, because it requires the use of fire heat, would be to defeat the object of the insurance, and to deprive the plaintiff of the chief benefit of his contract. The proposition, when pushed to that extent, becomes too preposterous to be seriously defended, and it must be equally indefensible in its application to any component part of the manufactory, or any trade, or vocation, inseparably or necessarily connected with its ordinary operations.

But it is suggested, that this carpenter was employed upon the buildings, and devoted a portion of his time in completing the interior of the establishment, and that he was not exclusively engaged in preparing necessary accommodation for the manufactory, storage and sale of the ware.

If the fact were so, I do not perceive how the defendants, upon the proofs in the case, could have any just cause of exception, on that ground, to his situation in the factory, as one of the necessary workman, or to the location of his workshop in the premises; for if this carpenter was a necessary workman, to be attached to the establishment, and actually filled that place in the factory, his occasional employment in making a fixture, or hanging a door, or otherwise completing the interior of the building, could not change the character of his permanent em-

gagement, or connect his regular employment with an unauthorized avocation; nor would his employer be exposed on that account, to the charge of an illicit occupancy, or use of the premises in the accommodation afforded to him in the buildings insured.

But I discover no trace of any such employment at any later period than the first of April. It is in evidence, and the fact is affirmed by the defendants' own witness, that the buildings were up and enclosed, and a great part of the interior completed before the date of the policy, and the witnesses who entered into details, all agree that what remained to be done, was to prepare and put up racks for drying, to place boards or shelves to set the ware upon, and to hang some doors that were left unhung; that no other work was done subsequently to the date of the policy, and that the whole of that work was finished, and the workmen discharged by the first of April, with the single exception of the carpenter, who was to be attached to the establishment, and one additional workman who continued until the first of June and no longer; and these two workmen were employed upon the racks and shelves,—fixtures which appertained to the business of the factory, rather than the completion of the buildings,—it being one of the regular employments of the carpenter of the establishment to make shelves to set the ware upon.

If then it should be conceded, that the employment of a carpenter upon the buildings insured, in completing them without the license of the insurer, would avoid or suspend the contract, that defence could not avail these defendants, because they have failed to establish the fact. It was incumbent upon them to sustain the charge which was to work the forfeiture of the contract, or to cause the suspension of its obligation upon them. But the testimony not only does not show the carpenter to have been employed upon the buildings, but justifies the conclusion, that he was in the service of the plaintiff, as a necessary workman for the ordinary purposes of the establishment, as a manufactory in full operation, and was engaged at the time of the fire, exclusively in the duties of that employment. And, however unwarrentable the use made of the buildings by the workmen may have been, the contract of insurance, by the terms of it, could be

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sususpended during the continuance only of such unauthorized use of them. And as the testimony conclusively proves, that they were finished, and the workmen discharged prior to, or certainly by the first of June, the policy from that time at least, if the accommodation of the carpenter of the establishment, in the store room did not suspend it, must be admitted to have taken effect; and it must have been in operation on the 27th July, when the manufactory was destroyed by the fire. The objection is reduced, therefore, to the question of the occupancy of the store room by the carpenter in the service of the establishment, which we have already discussed, and to which I now for a moment return.

The insurance was upon the manufactory; the parties to it must be intended to have known that its operations required the use of fire heat, and that a carpenter was a necessary workman to be attached to the establishment, and kept in constant employ by its conductors. The contract was made with that knowledge, and in reference to that use and application of the buildings insured: and the description of the premises in the policy as a china factory, was in effect an avowal of the intention of the assured to devote the buildings, and an assent of the underwriters, to the appropriation of them to the purposes required for the operations of such an establishment. The carpenters' risk enumerated in the memorandum of special rates, as extra-hazardous, cannot be allowed to obstruct the assured in the ordinary operations of his factory. The agreement, which the insurance of the premises as a manufactory imports, must have its full effect, and the general provision against the exercise of extra-hazardous trades and occupations in the premises, must be so restricted in its application, as to conform to the special intention of the parties, and the insured must consequently be, by necessary implication, authorized by the policy to appropriate a convenient and suitable room to the carpenter employed in the factory, for his accommodation as a necessary workman to be attached to the establishment.

These considerations incline me strongly to the conclusion, that the occupation of the store room, by the carpenter, in the manner and under the circumstances disclosed by the evidence

before us, was not such an unauthorized or prohibited exercise of an extra-hazardous trade in the premises, as to vitiate or suspend the contract. And when we superadd to them, the usage in proof in the case, it seems to us, that all the grounds of defence resting upon that objection, must be invalid ; I am, therefore of opinion, that the motion for a new trial must be denied.

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**OAKLEY, J.** The general question arising on this bill of exceptions, is whether a description filed in the office of an insurance company, and referred to in the policy, in general terms, as a report of the situation of the premises insured, is to be considered as incorporated in the policy, and as constituting a strict warranty. If so, it follows, from the established doctrine on the subject of warranties, that any variation, in the actual situation of the premises, from the description, renders the policy void, though it be immaterial, or the mere result of accident or mistake.

Assuming that the same rules of construction are to be applied to fire, as to marine policies, in determining what shall constitute a warranty, and what shall be a representation merely, the general principle seems to be well settled, that an express warranty must appear on the face of the policy, and that any instructions for insurance, unless inserted in the instrument itself, do not amount to a warranty. [1 *Con. Marsh.* 349. 451. *Pawson v. Watson, Coup.* 785. 2 *Caines*, 142. 3 *Ken's Com.* 235.] Thus it has been held, that a paper wrapped up in the policy, when presented to the underwriters, or annexed to it by a wafer, does not constitute a warranty ; (*Doug. 11, notis;*) and *Phillips*, in his *Treatise on Insurance*, (p. 125,) qualifies the general rule, by saying, that a warranty may be contained in documents, expressly referred to in the policy, and so made a part of it.

This qualification, or rather extension of the rule, rests upon the cases of *Routledge v. Burrell*, (1 *H. B.* 254,) and *Worsley v. Wood*, (6 *T. R.* 710.) On referring to these cases, it will be found, that the policies, on their face, contained an express stipulation that the insurers were to be liable, according to the exact terms of their printed proposals. It was necessary, therefore, to

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resort to those proposals, to ascertain the terms of the contract, and, without such reference, the contract itself would be unintelligible. In such a case, no doubt the proposals, thus referred to, may be considered as incorporated in the policy, and as making part of it.

But these cases certainly do not establish the rule, that every paper or document referred to in the policy, is to be considered as incorporated in it. When the policy itself contains a full and intelligible description of the subject matter insured, it is not necessary to look out of it, to ascertain the meaning of the contracting parties. The insurers having a description of the property in their possession, are presumed to insert in the policy itself, as much of that description as they deem material, and by omitting any part of it, they show that they are content to take such part as a representation merely, and to look to it only, for the purpose of estimating the risk. [1 Con. Marsh. 451.]

In reference to the case now before us, it seems to me that we cannot hold the description, as generally referred to in the present policy, to be a warranty, without violating the plain spirit and intent of the contract. The first condition annexed to the policy, provides that applications for insurance on property out of the city of New-York, must be in writing, and contain a description of it, and that if any person shall describe the same, otherwise than as it really is, so that it be insured at less than the rate of premium specified in the printed proposals of the company, the insurance shall be void.

Here is an express declaration of the object and effect of a representation or description of the subject insured. It is to enable the company to judge of the character of the risk, and any mistake or inaccuracy in it, is evidently considered as not affecting the contract, if it be not material. It is clear, that such a representation cannot be converted into a warranty by a mere reference to it, in the body of the policy, without entirely losing sight of the object for which it is required by the company to be made. Every policy contains such a general reference. It is a part of the printed clause of the instrument, and could never have been intended to convert into an express warranty, with all its

legal consequences, a document which the company required to be furnished only as a representation.

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As it respects insurances in this city, it is the known practice of the insurance companies, to employ their own surveyors or agents, to examine the situation of the property to be insured, and to make a report of it. That report is always filed, and referred to in general terms in the policy. Where the report or representation is thus the act of the insurers, it would be against all reason and justice to give it the legal effect of a technical warranty.

It could not be considered even as the representation of the insured, for the insurers act upon their own knowledge of the facts, upon which the risk is to be estimated.

It appears to me, from these considerations, that it will accord best with the interest of the parties to these fire policies, to consider nothing as a warranty in any sense, unless it is spread in express terms on the face of the instrument. This is a plain and simple rule, and does not conflict with any established principle of law on the subject of insurance. I am of opinion, therefore, that there was no error in the present case, on the part of the Judge, in charging the jury, that the plan or map of the premises insured, referred to in the policy, as a report on file in the office of the Eagle Company, was not a warranty, and that any variation between that plan and the actual situation of the buildings described in it, could not affect the contract of the parties, unless such variance should be deemed material in the estimation of the risk.

But it is contended by the defendants, that the actual situation of the buildings, at the time of the insurance, was misrepresented by the plaintiff. That they were represented and insured as finished, while the evidence shows that they were unfinished.

That the buildings insured were represented as finished, I think is very evident. They are stated as "*buildings occupied*" in a particular manner; a specific estimate of the value of each is made, and there is nowhere any intimation, that they were otherwise than finished. On looking at the survey of the buildings, as filed in the office of the Eagle Company, (to which the

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policy refers,) we find nothing to qualify the inference to be drawn from the general terms of the policy. In the survey, the buildings are spoken of as actually in use, and the appropriation of each is specified. The material inquiry then is, were the buildings in question finished on the 9th of January, 1827, the date of the policy?

The evidence on this point is certainly contradictory and uncertain; yet upon a careful examination of it, I am satisfied that the decided weight of the proof is, that the buildings insured were substantially finished at the time of the insurance. *Cowly*, a witness called by the defendants, and *Orr*, called by the plaintiff, concur in stating that they were completed at that time, and that all the carpenters' work done *to the buildings*, afterwards, consisted in hanging some doors, which had been left unhung, at the request of Orr. There was not then, in fact, any misrepresentation as to the state of the buildings, at the time of the insurance.

Another ground relied on for the defence is, that at the time of the fire, a *carpenter's shop* was kept in a part of the buildings, and that this, by virtue of an express stipulation in the policy, suspended its operation, so that it did not cover the property at the time of the loss.

"Carpenters in their own shops, or in buildings erecting or repairing," are denominated extra-hazardous trades, or business, in the proposals annexed to the policy. It may be necessary then to determine, whether the evidence, in this case, shows that there was a *carpenter in his shop*, or at work in the insured buildings, in erecting or repairing them.

It appears clearly, that at the time of the fire, there was one carpenter in the building. He had a work bench in one of the rooms, with some tools; but was not then employed in erecting or repairing the buildings. His work consisted in making "drying racks," and in planing boards to *set the china ware upon*; and it was intended to keep a workman of that description permanently attached to the factory.

I am of opinion, that this cannot be considered as a *carpenter working in his own shop*, or in erecting or repairing the build-

ings insured. It would seem rather as a part of the general business or trade of the china factory, and to be specially authorized by the policy. If the defendants wish to set up a violation of the clause in question, which is to defeat the insurance, without regard to its effect on the character of the risk, they must bring themselves strictly within its protection. This, in my judgment, they have failed to do, and the defence on this ground must also fail.

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I am of opinion, also, that the plaintiff is entitled to interest on the amount insured, from the time that the loss became payable, according to the terms of the policy.

*Motion for a new trial denied.*

[C. Graham, *att'y for the plff.* J. Leveridge, *att'y for the def'ts.*]

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A representation as to the situation of buildings to be insured, in relation to other contiguous buildings, made by the assured at the time of his application for insurance, does not amount to a *warranty* that such buildings are, or that they shall remain, during the continuance of the risk, in the situation described by the representation, unless such representation appear upon the face of the policy. If, upon an application for insurance, the assured describe the premises to be insured, by a diagram or otherwise, and represent the ground contiguous to such premises as "vacant," such representation does not amount to a *warranty* that the contiguous ground shall remain vacant during the continuance of the risk; neither is the assured prevented from building upon such vacant ground, by any prohibition in the policy, express or implied.

A fraudulent concealment of circumstances *material to the risk*, will vitiate the policy; and the assured cannot recover in *any* case, where the loss is occasioned by his own fraudulent, improper, or negligent acts.

Evidence as to a usage existing at New-York, that upon the occurring of any circumstance, whereby the risk is increased by the act of the assured, after the effecting of the insurance, notice thereof shall be given to the assurers, so that they may have the option of continuing the policy, or annulling it, cannot be received to alter the legal effect or operation of the contract.

THIS was an action upon a policy of insurance against fire. The policy bore date the 5th of January, 1827, and by it, the plaintiff was insured by the defendants to the amount of \$1750, for one year, (commencing on the 10th day of December, 1826,) "on a frame building, in three tenements, situated on the corner " of New-York Wharf and Commerce-street, in the city of Mo- " bile, privileged to contain hazardous goods, per report No. " 36,748, filed in the Washington Office."

The cause was tried before Mr. Justice OAKLEY. At the trial, it was proved that the premises insured were totally destroyed by fire in the month of October, 1827; and there was no controversy as to the interest of the plaintiff, or the sufficiency of his preliminary proofs.

The company set up, as their defence, the breach of a *warranty* implied in the policy, (as they contended,) on the part of the plaintiff, that he would not, during the continuance of the risk, erect any building upon certain vacant ground, contiguous to the premises insured. They therefore introduced the plaintiff's ap-

plication for insurance as evidence, which bore date at Mobile, the 23d of November, 1826. This application was contained in a letter addressed by the plaintiff to his correspondents in New-York, wherein he requested them to effect insurance in his behalf, to the amount of \$3500, for twelve months, on his store, "situated on the corner of Commerce-street and New-York Wharf;" and, for *particulars*, they were referred to a diagram annexed to the letter. By this diagram, it appeared, that Commerce-street was formed of planks projecting over the water, and the premises insured lay upon the corner of a square comprehended between Commerce-street, Alabama-street, Water-street, and New-York Wharf.

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Immediately adjoining the premises insured, were two other stores, and these three occupied the whole space fronting on Commerce-street, which intervened between New-York Wharf and Alabama-street. The space in the rear of these stores, and between them and Water-street, was marked on the diagram as "vacant," and there was also an alley-way near to Water-street, marked out on the same vacant space, as extending from Alabama-street to New-York Wharf; and the word "vacant" was placed on the diagram between the premises insured and the alley. After exhibiting this diagram the defendants offered to prove, that after the insurance was effected, and during the continuance of the risk, the plaintiff had erected *other buildings* immediately contiguous to the premises insured, *and that the risk was thereby increased*.

To the admission of this evidence, the counsel for the plaintiff objected, upon the ground, that it did not constitute any defence to the action. The Judge decided that the evidence was not admissible, unless the defendants also meant to show that the plaintiff intended, at the time of effecting the policy, to build upon the vacant ground, and concealed that intention from the defendants; or unless they could show that the fire originated in, or was occasioned by, the adjacent buildings so erected. To this decision the counsel for the defendants excepted.

The defendants then introduced evidence, which tended, in some degree, to show, that at the time the policy was effected,

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there were other buildings on the square besides those designated on the diagram, or at least upon that part of it lying between the alley-way and Water-street; and it clearly appeared that the plaintiff, or the plaintiff and other persons, had erected buildings, near to the premises insured, on the vacant ground, after the policy was effected, and during the continuance of the risk.

The defendants then offered also to prove, that there existed a *usage* at New-York, whereby the insured was bound to give notice to the insurers of any act done by himself after effecting the policy, which increased the risk; and that by such usage, the insurers had the privilege of continuing the policy after the notice, or of abandoning, it at their option. To the introduction of this evidence, the plaintiff objected, and it was overruled by the presiding Judge. To this decision, the defendants also excepted. There was no evidence offered to show that the fire, which destroyed the plaintiff's store, originated in the buildings erected on the ground which was vacant, when the policy was made; neither did it appear that the fire approached the premises insured, through the medium of the new buildings.\*

Upon this evidence, the Judge charged the jury, that the representation made by the plaintiff, as to the situation of the premises insured, in relation to other contiguous buildings, did not amount to a warranty that the ground, designated as "vacant," should be kept so during the continuance of the risk; and that the erection of other buildings by the plaintiff, after the date of the policy, on the vacant ground, did not vitiate the policy, unless the intention to erect such buildings existed in the mind of the plaintiff at the time he effected the insurance. That in such case, there would be a fraudulent concealment, on his part, of a fact material to the risk; but that the burthen of proving such fraud, rested upon the defendants.

\* By the conditions of insurance annexed to the policy, it was required that applications for insurance on property *out of the city of New-York*, should be in writing, and specify the construction and materials of the buildings to be insured, and their situation with respect to contiguous buildings. And if the person effecting the insurance, should describe the premises otherwise than as they really were, so that the same should be insured at less than the rate of premium specified in the printed proposals of the company, such insurance would be void.

The Judge also instructed the jury, that they were to find whether the representation made by the plaintiff to the defendants as to the situation of his store, in reference to other contiguous buildings, was true *in point of fact*: and if not true, whether the difference between the actual and the represented situation of the building materially enhanced the risk at the time the policy was effected. That if the representation was untrue in fact, still that their verdict would be for the plaintiff, unless the risk was materially increased by the actual situation of the store, in relation to the other buildings, or unless the plaintiff had concealed such actual situation with a fraudulent design.

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The Judge also further charged the jury, that as the word "contiguous," when applied to buildings, was uncertain and indefinite, they must give it such a meaning as they supposed was intended by the parties. That the proof on the part of the defendants, as to the existence of other buildings between the alley-way and Commerce-street, besides those designated on the diagram, was vague and uncertain; but if the jury were satisfied that such buildings were placed upon the ground assumed to be vacant, they were then to determine whether the risk was materially enhanced by such buildings. The jury were also charged that they were to determine whether the plaintiff's representation, as to the vacant ground in the rear of the buildings on Commerce-street, extended to Water-street, or only to the alley, leading from Alabama-street to New-York Wharf. That on this point the parties differed, and the jury, therefore, were to draw their own conclusions from the facts; if they supposed the representation extended to Water-street, then they were to determine whether the buildings on that street were so contiguous to the property insured, as to affect the risk.

The jury found a verdict for the plaintiff, under an arrangement between the parties, that the defendants should have leave to make a case, and turn the same into a bill of exceptions on the points of law raised at the trial.

A case having accordingly been made, the defendants now moved for a new trial, and the questions raised were argued

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by *Mr. T. L. Ogden* and *Mr. Slosson* for the defendants, and  
by *Mr. D. Lord* and *Mr. G. Griffen* for the plaintiff.

The defendants relied on the following points: I. That the *description* specifically referred to in the contract, and required by the proposals for insuring, annexed to the policy, ought to be considered as a *warranty*; and being untrue in point of fact, that the plaintiff was not entitled to recover.

II. That the description was binding on the assured, so far as it was connected with his own acts, during the continuance of the risk, whether considered as a *warranty* or as a representation; and therefore, that the testimony offered on the trial, as to the subsequent erection of contiguous buildings, by the assured, and of the increase of risk thereby produced, was material and ought to have been admitted. But considering the description as a representation merely, that the intention of the assured, at the time of the insurance, to erect other buildings on the ground then vacant, ought to have been inferred *prima facie* from the circumstances proved, and on this point that the verdict was against the evidence.

III. That the evidence as to usage, and the general practice in cases of alteration in the condition of the property insured, and change of circumstances relating to it, proceeding from the acts of the assured himself, was admissible and ought not to have been rejected.

IV. That the representation as to the vacant space in the rear of the buildings on Commerce-street, applied to all the ground between those buildings and Water-street, and as matter of construction the court ought so to have instructed the jury.

V. That the misrepresentation of the assured, as to the situation and circumstances of the property, in regard to surrounding buildings, and as to the extent of the vacant ground was

material ; and on this point also, that the verdict was against the weight of the evidence.

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In support of these positions it was observed, that applications for insurance are made, by the parties, the ground upon which the company are to regulate their contracts, and are therefore to be considered as incorporated into the agreement itself. That the defendants only desired that a fair and liberal interpretation might be applied to the application for insurance ; and that according to *that* interpretation it amounted to a warranty. That the *effect* of the warranty, as to the regulation of the contract, was matter of law.

*Mr. Ogden and Mr. Slosson.*

The party who makes an application for insurance is required, amongst other things, to describe the property to be insured, in respect to contiguous buildings. In compliance with this requisition, the plaintiff described the premises as having contiguous buildings on *one side*, but none in their rear. In this state of things, the premises were clearly exposed to less hazard than if the rear were filled with contiguous buildings. Suppose the ground designated as vacant on the diagram had been, in fact, filled with other buildings at the *time of the application* for insurance, as it afterwards was ; would there not have been in this case a clear breach of the description ? As there is danger of some kind to be guarded against, this is not in itself an immaterial circumstance. The company had the election after the representation was made, either not to assume the risk at all, or if thus assumed, to fix their own premium ; and this premium would be graduated of course, by the description contained in the application.

If then it was an essential part of the representation, that it should be *true* in this particular, it was a part of the contract, that it should *continue* so during the time the policy was to run. This is a correct principle in all cases of marine insurance, (as in warranties of neutrality, of convoy and the like,) because the representation is a part of the contract ; and the party cannot,

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by his own act, vary the relation in which he is placed by his  
own agreement.

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In this case there was also a *concealment*. The plaintiff must have had the intention to build upon the vacant ground when he effected the policy, because he proceeded to erect such buildings, within a short time after the date of his insurance. In contracts of insurance, good faith is required, and the plaintiff was bound to communicate all circumstances which were material to the risk.

II. But was there not a *warranty* on the part of the plaintiff, not only that the premises were, in fact, as he described them to be, but that they should *remain* so during the continuance of the risk?

The first condition of insurance attached to the policy, requires a true statement as to the actual condition of the property to be insured, and the contract is made upon the faith of this statement. The statement, then, is incorporated into the contract, and its materiality is a matter entirely between the parties. Contiguity of other buildings is certainly material, and correctness in this part of the representation, was of the last importance.

III. If the statement was a part of the contract it was of course a warranty, and if a warranty, it was co-extensive with the duration of the contract. [6 Cow. 673, *Fowler v. The Aetna Insurance Company*.]

Now the representation here is, that the premises to be insured were entirely detached from all the other buildings of the town, except those laid down on the diagram. There was then a material misdescription, which, *per se*, rendered the policy void. This description, as contained in the diagram, ought not to have been put to the jury upon the question of risk, because it was matter of law upon the face of the representation. Upon the diagram, the whole square or block, except that part which was on Commerce-street, is described as vacant; whereas, in point of fact, there were other buildings upon it at the very time, and

afterwards, more extensive erections were made by the plaintiff himself. But who is to prove the exact situation of the buildings at the time when they were insured? If this representation was a warranty, then the plaintiff is bound to show, as a condition precedent to his right of recovery, that he had complied with all the requirements of his contract.

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But the Judge was wrong in excluding the testimony, even if the application for insurance be taken as a *representation*. Every thing which leads to the making of the contract, is matter of proof under the representation; for representations may be executory. A warranty *to depart* with convoy is not complied with, if the convoy be abandoned before the voyage be ended. [Park on Ins. 395. Doug. 74., n.] So here, the representation was a *continuing* one, and was co-extensive with the duration of the contract. [2 Caines' Rep. 73, Goold v. The United Insurance Company.] The representation when taken thus strictly, is perhaps confined to the party's own acts; nevertheless to this extent it enters into the contract. In the case of Murray v. Alsop, (8 John. Cas. 47,) the representation was, that the vessel insured should have a bill of sale. She had one, at the time of sailing, but it could not be produced at the time of her capture, and it was held that the warranty was not complied with. [See also Doug. 271, Bize v. Fletcher. Park. on Ins. 133.]

Can the assured after the making of the policy, do any act to increase the risk? The Judge, at the trial, excluded all testimony showing an increase of risk, unless accompanied by proof that the assured intended to erect additional buildings at the time when he effected the policy, or unless the defendants could show that they were thereby actually injured. But we contend, that if the risk was increased, the policy was void; and the question for the jury was, not whether the defendants *sustained injury* by the buildings subsequently erected, but whether the risk was increased. The representation was material to the risk as we suppose, but that cannot now be ascertained, because all the testimony relating to it, was excluded at the trial. At all events, the representation was a material inducement to the con-

Dec. Term, tract, and if so, the plaintiff could not, by his own act, defeat the  
1829. understanding of the parties.

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Upon the point of usage, the testimony was also improperly excluded. If the plaintiff altered the state of the buildings, he was bound to communicate that fact to the company, that it might be known whether they would continue the risk or not. The contract was made in New-York, and was of course subject to the custom there, and the plaintiff was bound to know it. Usage enters into all mercantile contracts, and in this case it was of vital importance, and the evidence necessary to establish it should have been admitted. [2 *Marshall* 570, *Eng. Ed.*]

There was also error in this, at the trial; the diagram should not have been submitted to the jury for a construction as to its meaning. It is a written representation, and as such, should have been construed by the court.

For the *plaintiff* it was contended, I. That the erecting of buildings in the rear of the premises insured, was not prohibited by any stipulation in the policy express or implied, and could not therefore vitiate the contract.

II. That the evidence offered as to the usage of persons in New-York, who alter their buildings after insurance is effected, and the opinions of underwriters there as to the effect of such alterations upon the policy, were properly rejected.

Mr. Lord and Mr. Griffen.

As to the usage, if proved, its effect was to alter the clear terms of the contract, and, in fact, to engrave upon it a new clause of vital importance. The evidence was not offered to explain the meaning of a particular phrase, or the usage as to a particular trade, but its object was to put a construction upon the agreement. It is well settled, that the plain terms of a clear agreement, cannot be altered by proof of usage. [*Parkinson v. Collier*, Park 416. *Homer v. Dorr*, 10 Mass. Rep. 26. 6 *Taunt*. 446. *Aymar v. Astor*, 6 *Cow. Rep.* 266. *The N. Y. Ins. Co. v. Thomas*, 3 *John. Cas.* 1.]

Here the custom is local, it is confined to the City of New-York, and cannot be extended to parties residing in other states or countries. The custom of one manor cannot govern another, and in Mobile it may be different from our own. Where a contract is made with a *direct reference* to a foreign country, the laws and customs of that country ought, perhaps, to be the criterion by which it is to be construed.

But a custom to have force, must be so prevalent, as that *both* parties may be supposed to know the custom, and to contract with reference to it. Here the supposition of any personal acquaintance with the customs of New-York, is negatived by the terms of the first condition annexed to the policy, which contemplate that a policy by a non-resident may be effected by letter.

Every custom is in derogation of the common law, and it ought therefore, to be clear, that both parties were acquainted with it, and had reference to its terms, in making their contract. But here there is nothing to charge such knowledge upon the plaintiff, and the evidence offered was properly rejected.

In support of the plaintiff's first proposition it was contended that the erection of new buildings, contiguous to that insured, did not vitiate the policy. The defendants (it is said) do not allege that there is any *express* warranty that the contiguous land should *not* be builded upon, and if any such warranty exist, it must be implied from the nature of the engagement. But if any warranty can be implied, the defendants must assume, that the vacant contiguous ground, was under the control of the plaintiff, at the time when he effected his insurance. Now there is no evidence before the court, either that the plaintiff could control the contiguous vacant ground, or that he made any representation to that effect to the defendants. The defendants certainly knew that the contiguous land was vacant, and as they made no inquiry concerning the plaintiff's power over it, they made their contract with a perfect knowledge that the vacant ground was *liable* to be built upon. They have, then, with notice of all the circumstances, graduated the risk according to their own discretion. They have charged the plaintiff with their own premium, and cannot pretend that they have been deceived.

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But it is said, that the conditions of insurance require a representation as to the contiguous buildings. So they also require to know who occupy the contiguous buildings, how they are occupied, and the descriptions of goods contained in them. Will it be contended, that if, at the time the insurance was effected, a contiguous building was occupied as a dwelling, that the policy is destroyed, if the purpose for which such building was occupied, be changed for one more hazardous? If this be the true construction of the contract, then the interest of the assured may at any time be defeated by the act of a third person. The defendants themselves will hardly contend for a construction which is to be carried to this length.

So also it is said, that the application for insurance makes a part of the contract, and that the representation therein made, amounts to an express warranty that the contiguous ground was not only vacant when the policy was effected, but that it should continue to be vacant during the continuance of the risk.

But every express warranty must appear upon the face of the policy itself. [3 *Kent's Com.* 235. *Phil. on Ins.* 125.] The supposed exceptions are to be found in those cases where the warranty is contained in the proposals, which form a part of the policy. [1 *H. Bla.* 254. 6 *D. and E.* 710.] The rule suggested by Phillips, that a simple reference to documents make a part of the policy, is incorrect.

In this case, the application for insurance is to be taken in connexion with the first condition annexed to the policy, and that shows it to be a representation merely. *If the representation be false, whereby the defendants are induced to take the risk at a premium less than that which they would have demanded, had the representation been true, then the policy is void.* This is the utmost extent to which the rule can be carried, and the question, whether the representation be true or false, must always have reference to the risk; for if the application be considered as an express warranty, then any alteration in the contiguous ground or buildings, though tending to lessen the risk, would be a breach of the warranty, and vitiate the policy.

But the notion, that there is an implied warranty that the as-

sured shall do nothing to increase the risk, is altogether unfounded. The risk may be increased in a variety of ways, without injury to the contract; for the assured may increase the number of his family, convert the building into a boarding-house, and under-let the apartments in his house for any trades not interdicted by the policy.

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The contract between the parties, whatever it may be, is special and in detail, and the law will not raise any implied covenants or warranties. Where the contract is express, the law implies nothing. [*Vanderkarr v. Vanderkarr*, 11 Johns. R. 122.] Here the policy provides minutely as to every thing which shall vitiate the insurance, and has omitted every thing upon which the defendants rely. Hence "*expressio unius est exclusio alterius.*"

The contract provides, that the building shall not be applied to the purposes of hazardous trades, or for the storing of hazardous goods. But it claims no information respecting contiguous buildings between the date of the policy and its renewal. Were this omission *accidental*, it could not be remedied. But it is not accidental, and an express covenant that the assured should not improve his land, would be void as against sound policy. Suppose the insurance to be for seven years, cannot the assured, during all that period, use his property for its obvious purposes, without endangering his contract?

If there be an implied warranty that the assured shall not put up a contiguous building, why is there not a like warranty that he shall not use a contiguous building, already up, for a hazardous purpose? The only way in which the assured can forfeit his policy, (except by the violation of an express warranty or covenant,) is by doing that which is unlawful; as by setting fire to his own house, or by being guilty of some fraudulent practice, or perhaps by gross negligence.

Perhaps, if the *assured* were to use the contiguous land for some *unusual* purpose, such as erecting a brick-kiln thereon, whereby a loss should accrue, the law might interpose to save the assurers harmless. But in all these cases, it must first appear

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that the loss occurred in consequence of the fraud or negligence of the assured.

But in this case, there is nothing unusual in the appropriation of the contiguous ground to the purpose of erecting ware-houses thereon, and there is no pretence that the loss was occasioned thereby. No evidence was offered to show that the assured intended, at the date of the insurance, to erect buildings on the vacant ground, and if there was, the verdict of the jury upon this point, was conclusive. Neither was there any concealment, in point of fact, by the plaintiff, nor is there any pretence of fraud on his part.

It cannot be, that the assured is bound, by any change of circumstances, to make a second representation during the continuance of the first risk. By the twelfth condition of insurance, it is provided, that insurances may be *continued* under the original representation, where no changes have taken place; but where the risk is altered, then there must be a new representation, and another premium. Now this would be senseless, if a new representation were to be required during the continuance of the first risk. And if an original policy were void, for such change of risk, it would not be continued by a payment of a new premium on the old representation.

As to the argument drawn from marine contracts, it can have no application here, because there is no analogy between the two cases. The subjects of insurance are entirely different, and in marine policies, it is implied that certain things shall be done. If a vessel is to sail from one port to another, the contract is, that she shall proceed by the nearest usual route, as commercially understood, and a deviation makes another voyage. The deviation does not necessarily increase the risk, but it changes the voyage. So in all the cases put by the counsel for the defendants, some act is to be done by the assured, which is material to the contract. But here the argument is, that the assured is prohibited from doing any thing; his hands are tied; his property must lie unimproved, and any act which alters the situation of the property, destroys the contract, whether it increases the risk or not.

The extent to which the argument unavoidably leads, proves its incorrectness, and carries with it its own refutation.

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OAKLEY, J. This is an action on a fire policy, dated January the 5th, A. D. 1827. The property insured is described in the policy, as "a framed building in three tenements, situate on the "corner of New-York Wharf and Commerce-street, in the city of "Mobile, privileged to contain hazardous goods, *per report No. 36,748, filed in the Washington Office.*" The application for insurance, bears date at Mobile, on the 23d of Nov. 1826, and gives a description of the premises to be insured; and, with a view to point out their situation with respect to contiguous buildings, there is subjoined to, or inserted in the application, a map or diagram, on which the store of the plaintiff is marked out, and also two stores adjoining thereto; and in the rear of the whole, the word "vacant" is written. The New-York Wharf and Commerce-street, mentioned in the policy, are laid down on the diagram, and also two other streets, called Alabama-street and Water-street, forming in the whole a square, or parallelogram. The plan or map contains no building except the three stores abovementioned,—all of which front on Commerce-street.

At the trial, the defendants offered to prove, that subsequently to the insurance, the plaintiff had erected other buildings, immediately contiguous to the store insured, and on the ground represented as vacant, and that the risk of loss was thereby increased. The Judge rejected the evidence, unless the defendants meant to show that the intention of the plaintiff, at the time of effecting the insurance, was to erect these buildings, and that he had concealed that intention, or that the fire was occasioned by, or originated in the adjacent buildings so erected. To this decision of the Judge, the defendants excepted, and the first and principal question arising in this case is, whether the fact offered to be proved, would have avoided the policy.

It is contended, in the first place, that the application for insurance with the diagram, being referred to in the policy as a report on file in the Washington Office, is thereby incorporated in

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it, and is a warranty, not only that the ground marked on the diagram as vacant, was really so at the time, but that it should continue vacant during the running of the policy, and that the subsequent erection of any building, by the plaintiff, on such vacant ground, was a breach of the warranty.

It would be a sufficient answer to this position, to say, that there is no evidence in the case, showing that the application for insurance, is the report which the policy refers to. But as it seems to have been so considered at the trial, it is proper to assume the fact to be so, for the purposes of the present discussion.

In the case of *Delonguemare v. The Tradesmen's Ins. Co.* (*ante*, p. 580,) we had occasion to consider how far a general reference in a policy to a description of the insured property, on file in the office of the assurers, constituted that description a part of the contract, and converted it into a warranty; and the conclusion arrived at was, that no representation ought to be held to be a warranty, except it appeared on the face of the policy. The principles which led to that result, in that case, apply with greater force to the present; as the reference here, to the description of the premises, is less distinct and precise.

It is contended, in the second place, that the description of the vacant ground adjacent to the insured premises, whether considered as a warranty or a representation, was binding on the plaintiff, during the continuance of the policy; and that he had no right to erect buildings on such vacant ground, especially if such erections increased the risk.

It is clear, that there is no express prohibition in the policy against the erection of new buildings, contiguous to those insured; and it is difficult to see on what ground any such prohibition can be implied. The defendants have, by the terms of the policy, guarded against an increase of the risk, by an appropriation of the building insured to any hazardous business, or to the storing of hazardous goods not specially authorized, by suspending the policy during the continuance of the increased risk. They have not thought proper to introduce any such stipulation with respect to an increase of the risk, by the erection of adjacent

buildings ; and it would be unreasonable to imply a prohibition ^{Dec. Term,} ~~of so important a character, when the party has omitted to express it.~~ ^{1829.}

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Although the policy, in my judgment, is not rendered void by the subsequent erection of buildings adjacent to those insured, it by no means follows, that the insurers are compelled to bear any loss, which may be the result of such an act on the part of the assured. The contract of insurance, has its foundation in the mutual good faith of the parties. If the assured violates that good faith, in any circumstance entering into the creation of the contract, it is no doubt void. But if, subsequently to its formation, he acts with fraud, or gross negligence, or in bad faith, with respect to the subject matter insured, his rights, under the contract are not impaired, unless the loss, which he seeks to recover, is the result of his own misconduct. It is a general principle, that no man can derive a right of action against another, from his own violation of duty, or from his own illegal acts. Thus there is no stipulation in this policy, that the assured shall not set fire to the buildings insured. If he had done so, he could not recover the loss, on the ground, not that he had violated any stipulation in the contract, but that he could not profit by the consequences of his own illegal or fraudulent acts. If, however, he had set fire to an adjoining building with the intent to consume the one insured, but no injury to that had in fact ensued, it could not have been contended, that the policy was thereby rendered void ; notwithstanding the act would have been in the highest degree a violation of the good faith which was pledged to the insurers, that the risk should not be increased by any act of the assured.

An erection of buildings on vacant ground, by the assured, subsequently to the policy, and contiguous to those insured, whereby the risk is increased, stands upon the same principle. If buildings thus erected, should be removed before the occurrence of any loss, it could not be maintained that the policy would be thereby annulled. The act, not being in violation of any express stipulation in the policy, and not resulting in any actual injury to the insurers, the law would regard it as harmless and rightful ;

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and if this be so, it seems clearly to follow, that the continuance of such erections, (as in the case now before us,) until the fire; cannot change the legal consequences of the act of erecting them, if they have in no way been the cause of the loss. The act of the assured in erecting them, may have been a breach of an implied understanding between the parties, that the situation of the insured premises, with respect to the contiguous buildings, should not be changed by the act of the assured so as to increase the risk ; but if such increase of risk, has in fact, been without injury to the defendants, I hold that the policy is not affected by it.

Upon this view of the case I ruled at the trial, that evidence of the erection of buildings, by the assured, on the ground represented as vacant was immaterial, unless the defendants could show, that the fire which caused the loss originated in the buildings thus erected, or was communicated by them to the insured premises. The application of this principle to the case, seems to me to preserve unimpaired the rights of all the parties. The policy continues binding on the defendants, as to the risks, fairly assumed, while they cannot suffer from the acts of the plaintiff, by which those risks are alleged to have been increased. I think, therefore, that there was no error in the decision of the Judge, in excluding the evidence offered by the defendants on this point.

The defendants also offered to prove, that it is the usage of New-York, in case of the occurrence of any circumstance by the act of the assured, after effecting the insurance, whereby the risk is increased, for the assured to give notice thereof to the insurer, who is then to have the option of continuing the policy, or of annulling it. This evidence was also rejected by the Judge. It is contended by the defendants, that there was error in this respect also.

This evidence, it still appears to me, was properly rejected, on two grounds, 1st, that the usage offered to be proved was a local one, applying only to insurances on property, in the city of New-York ; and 2dly, that if it were a general usage, it could not be given in evidence, to alter the legal operation and effect of the policy. It was not offered to explain the meaning, or extent of any stipulation expressed in the contract, but with a view to introduce into it, an entirely new and distinct condition.

The Judge also left it to the jury to decide, how far the plaintiff's representation by the diagram, of the vacant ground in the rear of the insured premises extended, whether to Water-street, or to an alley dividing the lots fronting on Water-street, from those fronting on Commerce-street, which alley was laid down on the said diagram. The defendants now contend, that this was matter of law, and should have been determined by the court. As a general rule, the construction of written documents offered in evidence is matter of law; but in the present instance, that rule does not seem applicable. The effect of the diagram or map in question, could be ascertained only by determining the extent, to which the word "vacant" was intended to be applied, and this depended on the location of the word on the paper, and by its relative situation with the various streets and alleys laid down on the map. It seemed necessary, therefore, to submit the paper to the inspection of the jury; and it was their province to ascertain the facts which were to be inferred from it.

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Motion for a new trial denied.

[D. Lord, *Att'y for the plff.* Ogden and Huggins, *Att'ys for the def'ts.*]

WILLIAM ROBERTS versus HENRY CANINGTON.

The bond required by the 13th section of the Judiciary Act of 1789, upon the removal of a cause from a state court, to the Circuit Court of the U. S., is a joint and several bond, which should be offered at the time of the presenting of the petition.

Mr. D. Lord, in behalf of the defendant in this cause, read a petition for its removal into the Circuit Court of the United States, upon the ground that the defendant was a citizen of another state. As there had been considerable delay in the application, he read affidavits showing that it had been occasioned by the indisposition of the defendant's counsel.

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Mr. Slosson, contra, for the plaintiff objected, that the act of Congress, (*the 12th section of the Judiciary Act of 1789,*) had not been complied with, and that the defendant could not, therefore, transfer his cause into the Circuit Court at all. That the act requires a joint and several bond to be filed, and that in this case *the bond furnished by the defendants, was only a joint bond executed by himself and his surety.*

Mr. Lord insisted, that the spirit of the statute was complied with. That if a Court of Chancery could not in strictness allow a party to pursue the representatives of a joint obligor who dies, leaving his co-obligor bound, until all the remedies against the survivor had been exhausted, yet that a preference would be given to the creditor, and he would be first paid out of the assets of the deceased obligor. [*He cited 3 Ves. 574, Burn v. Burn.*]

Per Curiam. The plaintiff is entitled, by the express words of the act, to a joint and *several* bond from the defendant, who transfers a cause commenced against him in a state court, into the Circuit Court of the United States. Even although a Court of Equity might interpose, and furnish a remedy in some form to the plaintiff if required, yet he is entitled to a perfect security, and an adequate remedy *at law*, against *each* of the obligors. He is not bound to take a mere equitable lien, and the court cannot accept it. The petition and motion in this case must therefore be denied.

Mr. Lord then offered to file the security required by the statute, and give a joint and several bond for the defendant.

Per Curiam. It is too late. The bond must be filed at the time pointed out in the act.

ADVERTISEMENT.

It is the intention of the Editor, (in obedience to a wish generally expressed by the bar of New-York,) to publish another volume of these Reports, in the course of a short time, upon a plan somewhat different from that which he has hitherto adopted. The statements of the cases will be made in a more condensed form ; the arguments of counsel, for the most part, omitted,—while the points discussed will be preserved, with the authorities adduced in support of them. By this means, a volume of 650 pages may be made to contain, it is supposed, about 150 cases, and the value of the work thereby enhanced to the reader. The great increase of books of Reports, seems to make this course indispensable ; although the arguments of counsel, (if correctly reported,) generally throw much light upon the questions raised and decided.

ERRATA.

- Page 19, (line 14 from the bottom,) after the word "executed," insert *and*.
23, (in the caption, line 3 from the bottom,) for *querre*, read *quære*.
29, (line 8 from the bottom,) for *avered* read *overred*.
33, (line 3 from the top,) for *obliger* read *obligor*.
41, (line 9 from the bottom,) before the word *be*, insert *may*.
50, (line 5 from the bottom, in the note,) before the word "*Osgood*," insert *of*.
51, (line 2, in the caption,) for *ware*, read *wear*.
89, The name of Mr. Sullivan, the counsel, should be placed between lines 10
and 11, so as to precede the words, "*the pleadings*."
112, (in the caption, line 7,) after *as*, insert *to*, so that the sentence may read, *as*
to the prior endorsers.
112, (line 5 from the bottom,) for *endorser*s, read *endorsee*s.
124, (line 12 from the top,) for *chrage*, read *charge*.
137, (line 21 from bottom,) for *equa*, read *equo*.
137, (line 4 from bottom,) for *ad* read *in*, [*jus in rem.*]
142, (line 8 from the top,) for *direct* read "*joint*."
144, (line 13 from the top,) for *plaintiff*, read *defendant*.
148, (line 15 from the bottom,) for *independent* read *independently*.
162, (in the caption, line two from the bottom,) for "*held*," read *it seems*.
166, (line 9 from the top,) for *pretended* read *professed*.
166, (line 9 from the bottom,) for *on it*, read *in it*.
166, (line 3 from the bottom,) for "*can give*," read *gave*.
170, (line 4 from the bottom,) for *the city* read *this city*.
187, (line 18 from the top,) before "*case*" insert *a*.
198, (line 7 from the bottom,) for *previous*, read *previously*.
198, (line 5 from the bottom,) for *fact*, read *part*.
199, (line 7 from the top,) for *found*, read *deemed*.
217, (line 8 in the caption,) for *revived* read *reviewed*.
231, (in the names of the case,) for *Shillabee* read *Shillaber*.
232, (line 16 from the top,) for *issued* read *isue*.
233, (line 6 from the bottom,) for *pulled* read *put*.
234, (line 5 from the top,) for *renewed* read *revived*.
235, (line 7 from the top,) read "*set up a new contract*," and strike out the word
misprinted.
356, (line 14 from the top,) strike out "*and*," at the beginning of the line, and
insert it after "*favor*."
376, (line 12 from the top,) for *assests* read *assets*.
399, (line 2 from the bottom,) for *the fact* read *that fact*.
405, (in the caption,) for *at surplusage*, read *as*.
447, (line 12 from the bottom,) for *revised*, read *reviewed*.
453, (line 16 from the bottom,) for *on execution*, read *in execution*.
453, (line 8 from the bottom,) for *obtained by*, read "*against*."
455, (in the note, line 2 from the bottom,) for *intrusted*, read *interested*.
458, (line 12 from the bottom,) strike out the word "*conditions*."
473, (line 2 from the top,) for *counts*, read *courts*.
489, The *note* to be erased.

AN

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OF THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

A

ABATEMENT.

To an action of debt on a judgment obtained against the defendant, "in the term of February, 1827," in the Supreme Court, "then holden at the Capitol, in the City of Albany," the defendant pleaded in abatement to the jurisdiction of *this* Court, that "the cause of action, if any, accrued to the plaintiff in the County of Albany," &c. Upon demurrer to this plea, it was held, that if the plea were correct in point of principle, (upon the ground that the action of debt on judgment, is a local action;) it was; nevertheless, insufficient, because it did not show that the record of the judgment was filed in Albany.

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ABSQUE HOC.

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ACQUIESCENCE.

See VERDICT, 1, 2, 3.

ACTION.

See SHIPS and SHIPPING, 5.

ACTION ON THE CASE.

No person can lay the foundation of an action against another, by a wrong on his own part, or by a neglect or breach of his own duty.

Buckle v. The Dry-Dock Co., 151
The defendants were proprietors of a certain dry-dock, with a machine to raise vessels out of the water, for the purpose of cleaning and repairing their bottoms. The plaintiffs hired this machine, and placed a vessel upon it, under the direction of their own agents and workmen; and in an attempt to burn off the tar from her bottom, the vessel took fire, and was much injured. An action being brought by the plaintiffs against the defendants for neg-

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ligence on their part as to the manner in which the machine was kept, and for its improper construction in a certain particular, the defendants proved that the injury to the vessel was occasioned by carelessness and neglect on the part of the plaintiffs in the use of the machine. The Judge charged the jury, that if the injury were attributable to carelessness, or want of proper precaution on the part of the *plaintiffs*, in the use of the machine, the defendants were not liable; and the jury having returned a verdict for the defendants, a new trial was denied.

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ANSWER IN CHANCERY.

See ASSUMPSIT, 2, 3.

APPLICATION OF PAYMENTS.

1. A debtor who pays money to his creditor, being liable to him upon more accounts than one, has a right to direct the application of the payment to whichever subject he may choose: and where the jury neglected or refused to follow this rule, the court granted a new trial.

Hall and Montross v. Constant, 185

2. Where there are several debts, some of which are *guaranteed*, and some are not, and a payment is made by the debtor, the creditor may apply it as he pleases, unless a special application is made by the debtor.

Clark & Clark v. Burdett, 197

ARBITRATOR.

See AWARD.

ARBITRATION BOND.

1. Although an action of debt upon an arbitration *bond* cannot be sustained, where the award is not made within the time specified in the condition, and the parties have, by a new agreement, extended the time for making the award; yet where the declaration sets forth the bond, *the enlargement of the time* by the new agreement, an award within the extended period, and a breach of its requirements, on the part of the defendant, it contains a complete cause of action.

Myers v. Dixon, 456

2. To an action of debt, wherein the above particulars were all set forth,

the defendant, by plea, set out the original arbitration bond, and the award, whereby it appeared that the award was not made within the period originally stipulated. Upon demurrer to this plea, it was held not to be an answer to the declaration—no notice being taken in it of the allegations in the declaration, as to the enlarged time. *Id.*

ARTICLES OF AGREEMENT.

See PARTNERSHIP, 1.

ASSENT.

See EVIDENCE, 3, 5.

ASSIGNMENT.

See ASSUMPSIT, 1, 2, 3. *INSURANCE*, 4.
MONEY HAD AND RECEIVED, 2.

ASSUMPSIT.

1. In order to maintain *assumpsit* against two trustees jointly, for money had and received to the use of the *cestuy que trust*, the plaintiff must prove a *joint promise*, either express or implied. As each trustee is, in general, answerable for his own acts only, the law will not imply a joint promise on the part of both to pay over the money in their hands to the *cestuy que trust*, from the mere fact that each trustee has, for himself, separately admitted that there were funds in his possession equal to the amount of the plaintiff's claim. *De Forest v. Jewett & Parsons*, 130

2. The plaintiffs in this case, being creditors of C. & D. (who had assigned their property to the defendants by a deed of trust for the benefit of certain persons, among whom were the plaintiffs) filed a bill in equity against the defendants. The defendants answered separately, and each in his answer admitted that he had received funds to

a considerable amount out of the estate assigned, and that he then held in his hands a sum equal to the plaintiffs' demand, which he proffered his readiness to distribute according to the terms of the trust.

3. Upon an action of *assumpsit* against both trustees for money had and received to the use of the plaintiffs, founded upon these admissions, it was held, that the proof did not support the declaration, and that the plaintiffs could not recover unless they proved a joint promise on the part of both defendants. *Id.*

4. A contract in writing and under seal, so executed as not to be binding upon either party, but which has been acted upon by them, may be given in evidence, in an action of *assumpsit*, to recover the balance of an account, for the purpose of showing the terms on which one party made advances, and the other performed services.

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5. G. S. and G. the lessees of a theatre, by their agent, advanced certain sums of money to the defendant Celeste, as a performer, under an agreement, that she should be under the exclusive direction of one of the lessees, who was the manager of the theatre. In an action brought to recover back a part of the advances so made, it was held that the action was properly brought in the name of all the lessees; and that the circumstance of the performer's being under the exclusive direction of one of the plaintiffs, did not vary the form of bringing the action. *Id.*

6. The plaintiffs, (auctioneers,) sold to the defendants a quantity of goods, by auction, to be paid for in an approved endorsed note, at six months. The plaintiffs having delivered the goods, demanded the note, which being re-

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fused, they immediately commenced an action for goods sold and delivered. The defendants contended that the action should have been special, for the non-delivery of the notes, and that *indebitatus assumpsit* would not lie until the credit had expired.

HELD, that the sale and delivery of the goods were conditional, and that the plaintiffs, upon the non-compliance with the conditions of sale by the defendants, might reclaim their goods, or treat the sale as an absolute one, without credit, and bring their action for the price without delay.

Corlies et al. v. Gardner 345

See EVIDENCE, 5. GUARANTY, 3. HUSBAND, and WIFE. MONEY HAD AND RECEIVED. MONEY PAID, 1, 2. PARTNERSHIP, 2. PHYSICIAN. PRINCIPAL and AGENT. RELEASE. SHIPS and SHIPPING, 10. STOCKS, 1, 4. TRESPASS.

ATTORNEY.

See LUNACY.

AUCTIONEERS.

See ASSUMPSIT, 6.

AUTHORITY.

See COVENANT, 1. STOCKS, 1.

AVERTMENTS.

See DAMAGES. INSOLVENTS' DISCHARGE, 3, 4. PLEAS and PLEADING, 1. TENDER.

AWARD.

1. The plaintiff by a contract in writing, agreed to "make and complete" for the defendant a steam-engine, which he warranted against "ordinary wear" for the space of sixty days. After the engine was delivered, repairs were made

upon it by the plaintiff, for which he brought an action of *assumpsit*. At the trial the defendant set up an *award* in his defence, and insisted that all matters in controversy between himself and the plaintiff had been submitted to an arbitrator. The award was not accompanied by any *submission*, and the plaintiff was permitted to call the arbitrator to prove that the submission did not embrace the claims for which this action was brought. **HELD**, that as the submission was by *parol*, and as the award did not in terms cover all matters in controversy between the parties, the evidence of the arbitrator to show what the matters submitted were, was rightfully admitted.

Birkbeck v. Burrows, 51

2. It having been proved by the plaintiff that the defendant had offered him a certain sum to settle the controversy between them, the defendant produced a copy of a letter from himself to the plaintiff, explanatory of that offer. The writing was excluded by the presiding Judge, but the defendant was permitted to prove the fact, that he had made such a communication. **HELD**, that the testimony thus offered by the defendant, being in effect his own declarations, was rightfully rejected. *Id.*

3. The arbitrator testified that when the parties were before him, a bill was presented specifying the accounts submitted; a copy of which he transmitted to the plaintiff, accompanied by the award: but the plaintiff denied that the account was received by him. **HELD**, that the plaintiff was not thereby precluded from introducing other evidence as to the items of his claims, unless the defendant could show that the account came into his possession, or under his control. *Id.*

4. The defendant offered to show what articles enter into the composition of a "complete steam-engine" and that

many of those embraced in the plaintiff's bill were of that description. This evidence was excluded by the presiding Judge, and his decision was held to be correct. *Id.*

5. The Judge charged the jury that the award was conclusive as to every thing, which had been submitted: and left them to say whether the items of the present claim had been before the arbitrator or not. If they had; then that their verdict should be for the defendant; but if they had not, then that their verdict would be for the plaintiff. That by the agreement between the parties, the plaintiff was bound to make good all damages to the steam engine arising from ordinary wear, for the space of sixty days; and that if any of the present charges were of that kind, they were to be excluded from the account. HELD, that the charge and ruling of the Judge were in all respects correct; but the jury having found a verdict for \$925,43, in favor of the plaintiff, it was set aside (on payment of costs by the defendant) upon the ground that substantial justice had not been done to the defendant. *Id.*

See ARBITRATION BOND. NEW TRIAL, 1.

B

BANK.

See PROMISSORY NOTES, 3. LUNACY. HUSBAND and WIFE.

BANKER'S CHECK.

See BILLS OF EXCHANGE. RESTRAINING ACT.

BANK NOTES.

See SPECIAL AGREEMENT.

BARRATRY.

Notwithstanding the clause in a policy of insurance, whereby the insured warrant the property "free from any charge, " damage or loss, which may arise in "consequence of a seizure, or detention for, or on account of any illicit, " or prohibited trade," the underwriters are liable for the consequences of an illicit traffic, barratrously carried on by the master and crew, at a foreign port, without the knowledge or privity of the owners, whereby the property insured is seized, and becomes forfeited by the laws of the country.

Dunham & Wadsworth v. The American Ins. Co. 422

BILL IN CHANCERY.

See WITNESS, 2.

BILL OF EXCEPTIONS.

See PRACTICE, 1, 2, 5.

BILLS OF EXCHANGE.

The defendant, residing in Dutchess County, drew an order, payable on demand, in favor of the plaintiffs, for 100 dollars, on one Ring, the master of a sloop, by whom he was in the habit of sending his produce to market. The order was not negotiable, nor was it presented until nearly six years after its date; and in the mean time, various settlements had taken place between the plaintiffs and the drawee.

HELD, that if the draft was to be considered as an inland bill of exchange, the drawer was discharged by the laches of the holders; but if it were treated as a mere banker's check, then that a presentation for payment, at any time before suit brought, would be sufficient, unless the drawer could show injury from the delay. HELD also, that the consideration of the order, whether check or bill, could be inquired into, between the original parties; and as

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the defendant contended, that the order was drawn for the mere accommodation of the plaintiffs, the court ordered that question to be submitted to a jury.
Elting v. Shook, 459

See MONEY PAID, 1, 2.

BILL OF LADING.

See TROVER, 2, 3, 4, 5.

BILLS OF PARTICULARS.

See AWARD, 3.

BILL OF SALE.

See SHIPS and SHIPPING, 2, 4.

BOOKS.

See SHIPS and SHIPPING, 6, 9.

BOND.

The bond required by the 12th sect. of the judiciary act of 1789, upon the removal of a cause from a state court into the Circuit Court of the United States, is a joint and several bond, which must be offered at the time pointed out in the act.

Roberts v. Carrington, 650

See ARBITRATION BOND, 1. INSOLVENTS' DISCHARGE, 7. RESPONSIBILITY.

BREACH OF CONTRACT.

See SPECIAL AGREEMENT.

C

CASE MADE.

See PRACTICE, 1, 2.

CAUSE OF ACTION.

See PLEAS and PLEADING, 1.

CERTIFICATE.

See STOCKS, 3.

CERTIORARI.

See INFANCY.

CHARTER PARTY.

1. In an action of covenant on a charter-party, the declaration set forth, that the defendant had stipulated that a vessel, of which he was the owner, should perform a voyage from N. Y. to Omoa and back for the plaintiff. That all the covenants, on the part of the plaintiff were performed; but that said vessel, instead of proceeding to Omoa, put into the port of Norfolk, and that the defendant did not despatch her thence, but neglected and refused so to do, contrary to the effect of the charter-party.

The defendant pleaded six special pleas in bar. The first and second, set forth in substance, that the vessel, while proceeding on her voyage, was so much damaged by the perils of the seas, that she put into Norfolk, as a port of necessity, where the plaintiff took possession of the cargo, and of the same ever afterwards retained possession.

The fourth plea, after admitting the charter-party, the sailing of the vessel, and that she put into Norfolk, &c., alleged that said vessel, while prosecuting her voyage, was so much damaged by the perils of the seas, that it became necessary, that she should put into the nearest port, and that Norfolk was, accordingly selected as a port of necessity. That while there, the said vessel was examined, to ascertain what repairs were requisite to enable her to proceed on her voyage, when it was found necessary, for the benefit of all concerned, that she should be sold, that

she was sold accordingly, "and so, "and not otherwise, the said voyage, "was, by the mere perils of the sea, "broken up."

The fifth and sixth pleas alleged, that the plaintiff ought not to maintain his action, because the cargo, mentioned in the declaration, belonged to, and was laden on board of said vessel, for one *John Living*, for whom said charter-party was made by the defendant, as his agent, *as appeared by the oyer thereof*.

Upon demurrer to these pleas, the plaintiff had judgment upon the first, second, fifth and sixth, and the defendant upon the fourth.

Wheelwright v. Beers,

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2. The declaration in this case, (the same mentioned in the preceding one,) set forth a charter-party, whereby the defendant stipulated, that the brig Champion, of which he was the owner, should perform a voyage from N. Y. to Omoa and back, for the plaintiff. It then averred a performance of all the covenants on the part of the plaintiff, and assigned, as a breach of the defendant's covenant, that the vessel did not proceed to Omoa, but put into Norfolk. That the defendant did not despatch her thence, but neglected and refused so to do, contrary to the effect of the charter-party.

The defendant interposed a special plea, admitting the charter-party, the sailing of the vessel, and that she put into Norfolk; but averring that said vessel was so much damaged by the perils of the sea, that it became necessary that she should put into the nearest port, and that she accordingly put into Norfolk, as a port of necessity. That while there, she was examined for the purpose of ascertaining what repairs were requisite to enable her to proceed on the voyage, when it was found necessary, that she should be sold for the benefit of all concerned,—that she was sold accordingly, and so, and not

otherwise, the voyage aforesaid, was, by the mere perils of the sea, broken up and prevented, "*absque hoc*, that the said vessel ought to have proceeded on her said voyage," &c.

To this plea the plaintiff replied, admitting the injury to the vessel, the putting into Norfolk, and the breaking up of the voyage there, but averred that the voyage was not broken up by the mere perils of the sea, &c., "*absque hoc*, "that the vessel was examined at "Norfolk, to ascertain the repairs necessary to enable her to proceed on her voyage," &c., as alleged by the defendant, and concluding to the country.

HELD, that the issue joined by these pleadings, was upon the fact stated in the *inducement* to the plea, whether the voyage in question was broken up by the mere perils of the sea; and that it involved necessarily, an inquiry, as to the seaworthiness of the vessel;—the special traverse in the plea, and in the replication being considered immaterial and informal.

Wheelwright v. Beers,

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3. The jury having returned a verdict in favor of the plaintiff upon this issue, it was also **HELD**, that the rule of damages to be adopted, was the difference between the prime cost of the cargo at New-York, and the net amount for which the goods were actually sold after the voyage was broken up, no notice being taken of the loss of the market at Omoa.

Id:

4. The defendant chartered a vessel of the plaintiff, for a voyage from New-York to Gibraltar, thence to Santa Cruz, in the Island of Teneriffe, thence to Havannah, and from H. back to New-York. In an action upon the charter-party, the declaration averred a *general performance* of the voyage described in it, and also a specific and particular performance, alleging that the vessel proceeded to Gibraltar and

to Vera Cruz, thence to Havannah,
&c.

At the trial, it appeared that the defendant put a supercargo on board the vessel, who acted as his agent during the voyage. That the vessel arrived at Santa Cruz, as stated in the declaration; but instead of proceeding directly to Havannah from Vera Cruz, she first went to Oratava, (a port on the west side of Teneriffe,) at the request of the supercargo, and for the benefit of the defendant, and from thence to Havannah.

HELD, that the declaration was supported substantially by this proof, and that there was no variance to furnish ground for a nonsuit. HELD also, that the declarations of the supercargo accompanying his acts, might be given in evidence as part of the *res gestae*, he being the agent of the defendant.

Higgins v. Solomon, 482

See TROVER, 2, 3, 4, 5.

CHECK.

See BILLS OF EXCHANGE. HUSBAND and WIFE. LUNACY. RESTRAINING ACT.

CHRISTIAN NAME.

See MISNOMER.

COMMISSION.

Where a party, upon an affidavit, sets forth the *facts*, which he wishes to establish under a commission to a foreign country, and shows that those facts can only be proved by persons in the employment of his antagonist, whose names are unknown to him, the court will either permit the commission to issue generally without the names of the witnesses, or grant a stay of proceedings until their names can be ascertained.

Shaffer v. Wilcox, 502

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COMPROMISE.

See AWARD, 2.

CONDITION.

See ASSUMPSIT, 6. PLEAS and PLEDGING, 1. TROVER, 2, 3, 4, 5.

CONDITION PRECEDENT.

See GUARANTY, 2. TROVER, 2, 3, 4, 5.

CONDITIONAL SALE.

See TROVER, 2, 3, 4, 5.

CONSIDERATION.

1. The payment of *part of a debt due*, is no consideration to support a promise to give further time for the payment of the balance.

Hall & Montross v. Constant, 185

2. Although a promise to pay a sum of money, founded upon the forbearing to prosecute a suit, which could not be maintained, is void, for want of consideration; yet, the defendant, in order to avail himself of such a defence, must show *conclusively*, that the suit, which was the foundation of the promise, could not have been prosecuted to effect.

Gould v. Armstrong, 266

3. The plaintiffs, as the holders of certain notes or memorandums, payable to bearer, brought an action of assumpsit, to recover their amount. At the trial, the defendant offered to show that the notes were given for a consideration, made unlawful by an act of congress; but he offered no evidence to prove that the plaintiffs were acquainted with the consideration for which the notes were given. HELD, that as the act of congress did not make the notes void, the evidence offered by the defendant, to defeat the recovery, was inadmissible. *Id.*

- 4.** In an action for the breach of the defendant's contract to sell and deliver certain goods to the plaintiff, the promise of the latter to accept the goods and pay for them, is a good consideration for the defendant's promise to deliver them.

White v. Demill, 405

See **BILLS OF EXCHANGE.** **GUARANTY.**
INSOLVENTS' DISCHARGE, 6. **MONEY**
HAD AND RECEIVED, 3. **RELEASE.**
SPECIAL AGREEMENT. **STOCKS,** 4.
SURETY, 1, 2.

CONSPIRACY.

- 1.** In an action upon the case, in the nature of a conspiracy, the declaration alleged a combination among the defendants, for the purpose of defrauding the plaintiffs of certain merchandise, under color of a purchase of it by the defendant, Lawrence, that it might be converted to the benefit of Davis, and described the various acts whereby the fraud was to be perpetrated. Some of these acts were charged to have been done by all the defendants, and others by one or two of them, but all in pursuance of the original combination. Upon demurrer to the declaration, (both general and special,) it was HELD, that whatever is done in pursuance of a fraudulent combination, by any of the parties concerned in it, may be averred to be the act of all. That the conspiracy is only important as it gives a character to the acts of the parties to it, and charges them with the legal consequences of such acts.

Tappan et al v. Powers et al, 277

- 2.** In all cases where fraud on the part of the defendant is averred, and damage to the plaintiff as the consequence of it, an action will lie. And where the declaration sets forth a conspiracy, the act of each defendant, done in furtherance of its objects, may be stated to have been done indi-

dually : and such act, in judgment of law, is the act of all ; the *gist* of the action being the *damage* to the plaintiff, and not the conspiracy. *Id.*

CONTINUING GUARANTY.

See **GUARANTY,** 2.

CORPORATION.

See **Natural CORPORATION.**

CONTRACTS.

See **ASSUMPSIT.** **CONSIDERATION.** **COVENANT.** **RESPONDENTIA.** **SPECIAL AGREEMENTS,** 1, 2. **TENDER.**

COSTS.

See **EVIDENCE,** 1. **NEW TRIAL,** 1.
PRACTICE, 4, 7, 8, 10.

COVENANT.

- 1.** The plaintiffs entered into a covenant with the defendants, whereby they stipulated to build and finish the Masonic Hall, in the city of New-York, within a certain period, under a penalty of thirty dollars, as liquidated damages for each and every day the work should remain unfinished after the stipulated time. HELD, that by the true construction of the covenant, the building was not to be finished *absolutely* within any stipulated period ; but if not completed by the time fixed, the plaintiffs were liable, for each day's delay, to the amount of the liquidated damages.

Farnham & Pollard v. Ross et al, 167

- 2.** The plaintiffs completed the building within the specified time, with the exception of the front doors, and a certain stair-way. These would have been completed also, but for the defendants themselves, who made certain alterations in their plan of the stairs, and

delayed the finishing of the doors. In an action upon the covenant for the contract price of the work, it was held, that this proof supported the averment of performance on the part of the plaintiffs, and that the defendants could not interpose, as a defence, a delay occasioned by their own acts. As the plaintiffs would, but for the defendants, have completed the building within the specified time, their conduct was tantamount to an averment of performance on their part, and a refusal by the defendants, which are held to be equivalent to an actual performance. *Id.*

3. In an action of covenant, it appeared that one Pepper hired a house of the plaintiff, and that the defendant agreed to become his surety for the payment of the rent. P. executed a covenant under seal for the payment of the rent, and the defendant on the same paper, executed an agreement also, under seal, to be his surety, but there was no witness to the signature of either.— Pepper took the paper containing both agreements, for the purpose of delivering them to the plaintiff, who, upon inspection, objected to the form of the execution of the covenant by P., because there was no witness to his signature. P. therefore erased his signature, and wrote his name anew, in the presence of a witness, who signed it, and the paper was then delivered by P. to the plaintiff. The defendant was not present at this transaction, nor did he know any thing of it; but being sued upon his guaranty, he contended that the erasure of the signature of P., under the circumstances of the case, discharged him as surety.

HELD, that the signing and sealing of the covenant anew by P., was to be considered as an original execution and delivery of it. That the defendant, by signing the guaranty on the covenant itself, and entrusting it to P., thereby gave him authority to complete the de-

livery of both instruments. That there was no alteration in the terms of the contract, whereby the surety could be prejudiced, and that he was therefore bound by it.

Dusenberry v. O'Shields. 379

4. A covenant made by J. W. as agent for J. L., will support an action in the name of the former, although he has no interest in the subject of it; and the declaration may allege the damage to have been sustained by J. W.
Wheelwright v. Beers, 391

See CHARTER PARTY. ASSUMPSIT 4.

COVERTURE.

See HUSBAND and WIFE.

CREDIT.

See GUARANTY.

CUMULATIVE EVIDENCE.

See NEW TRIAL, 3.

CUSTOM HOUSE.

See SHIPS and SHIPPING, 1.

D

DAMAGES.

The first four counts of the declaration, stated the damages, resulting from the breach assigned, to consist in a loss of the *profits* of the purchase; but there was a general averment of *pecuniary* damage at the conclusion of these, as well as the common counts. Upon demurrer to the first four counts, for the want of proper averments of tender and damage, it was HELD that the allegation of special damage at the end of each count might be considered as surplusage, and that the general averment of damage, at the conclusion of

the declaration, was applicable to each separate count.

White v. Demill, 405

See CHARTER PARTY, 3. COVENANT, 1, 2, 3.

DEBT.

See ARBITRATION BOND. GAMING. INSOLVENTS' DISCHARGE, 7.

DEBT ON JUDGMENT.

1. If, to an action of debt, on a judgment, obtained in another state, the defendant plead, that he "was never an inhabitant of, or resident in" the state where the judgment was rendered, "nor within the jurisdiction of its courts;" that "the original process was never served upon him personally," and that he "never appeared to the suit, nor had notice of the same;" the plaintiff cannot set up, by way of estoppel, in his replication, that the "judgment record declares and avers," that the defendant did appear; but must take issue upon the fact of his appearance in the court, which rendered the judgment.

Harrod v. Barreto et al., 302

2. To an action of debt, on a judgment obtained in the state of Alabama, the defendant pleaded, that he was not within the jurisdiction of the court, at the time of the suit, upon which the judgment was obtained, was commenced, nor at any time afterwards; that he did not appear to said suit in person, nor authorize any one to appear for him, and that he had no notice of the pendency of the suit until after the judgment was obtained.

The plaintiffs replied, that by a law of Alabama, it is enacted, "that when a writ shall be issued against all the partners of any firm, service of the same on any one of them, shall be deemed equivalent to a service on

"all, and the plaintiff may file his declaration and proceed to judgment, as if the writ had been served on each defendant, and the judgment shall be equally valid and effectual on all the defendants." That the cause of action, upon which said judgment was obtained, was a bill of exchange, drawn by the defendants, under their co-partnership firm; that they were, at the time of the drawing of said bill, co-partners, having a house of trade established at Mobile; that the writ on which said judgment was obtained was issued against all the defendants, as co-partners; and that it was personally served on the defendant, Niles, in the county of Mobile.

The defendant rejoined, that the co-partnership had been dissolved before the suing out of the writ, and specially traversed the allegation, that the writ was served on Niles during the continuance of the co-partnership. Upon demurrer to the rejoinder, it was held, that the replication was bad. That the law of Alabama could not give jurisdiction over the person of the defendant, who was not within that state; and that the judgment did not, therefore, bind him personally, nor subject his separate property to its power.

Wilson and Hallett v. Niles et al., 358

3. An action of debt, in this court, will lie upon a judgment obtained in the Marine Court. And where the declaration alleged, that the plaintiff, "left his certain plaint" in the Marine Court, against the defendant, for a cause of action arising within its jurisdiction, and such proceedings were had, that a judgment was obtained, &c., a demurrer to it, for want of jurisdiction, as manifested by the pleading, was held to be not well taken.

Bennet v. Moody, 471

4. Although the first process in the Marine Court is by summons or warrant,

it does not follow, from this, that such process may not be founded upon a plaint previously filed. But if otherwise, then the words, "levied his certain plaint," are to be taken as tantamount to "commenced his suit," or "impleaded the defendant;" either of which would be sufficient, *prima facie*, to show, that the court had jurisdiction over the defendant's person. *Id.*

See ABATEMENT. INSOLVENTS' DISCHARGE.

DEBTOR and CREDITOR.

See APPLICATION OF PAYMENTS, 1, 2.

DECLARATIONS.

See CHARTER PARTY, 4. PARTNERSHIP, 1.

DEED.

The only fraud, which can be pleaded, at law, to avoid a deed, is fraud in its execution; such as a fraudulent reading of it, or the substitution of one instrument for another, or the obtaining, by some device, such an instrument as the party did not intend to give.

Belden v. Davies, 433

See SHIPS and SHIPPING, 2.

DEFAULT.

See PRACTICE, 3.

DEFEASANCE.

See SHIPS and SHIPPING, 1, 4.

DEFENDANTS' JOINT.

See SHIPS and SHIPPING, 5.

DELAY.

See SURETY, 1, 2.

DEMAND.

See APPLICATION OF PAYMENTS, 2. PROMISSORY NOTES, 3, 4.

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See ABATEMENT. ARBITRATION BOND, 2. CONSPIRACY, 1, 2. DAMAGES. DEBT ON JUDGMENT, 1, 2, 3. GENERAL ISSUE: INSOLVENTS' DISCHARGE, 1, 2, 3, 6. INSURANCE, 1, 2. NULLITY CORPORATION, 1. PLEAS and PLEADING, 1. PRACTICE, 11. RESPONDENTIA. SPECIAL AGREEMENTS, 3.

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See INSOLVENTS' DISCHARGE, 6.

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See RESPONDENTIA.

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See PROMISSORY NOTES, 2.

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See INSOLVENTS' DISCHARGE, 1, 2, 3, 4, 5. SHIPS and SHIPPING, 10.

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See SPECIAL AGREEMENT.

DISCOVERY.

See PRACTICE, 6.

DOUBLE PLEAS.

See PRACTICE, 3.

DRAFT.*See BILLS OF EXCHANGE.***DUPLICITY IN PLEADING.***See INSOLVENTS' DISCHARGE, 6.***E****ENLARGED TIME.***See ARBITRATION BOND, 1, 2.***ESTOPPEL.***See DEBT ON JUDGMENT.***EVIDENCE.**

1. The mortgagor of a vessel is a competent witness for the mortgagee, who is sued as *owner*, to show the nature of the transfer, and to prove that a conveyance, apparently absolute, was in fact conditional. His interest in the suit is balanced, and as the mortgagee, if liable at all, is liable, either as owner, or as mortgagee in possession, the mortgagor would not be responsible to him for *costs*, it being the duty of the mortgagee, *under such circumstances*, to pay for the repairs in the first instance, without suit.

Ring & M:Namara v. Franklin, 1

2. If improper evidence, objected to at the trial of a cause, be permitted by the Judge to go to the jury, the verdict will be set aside and a new trial granted, notwithstanding there was sufficient competent testimony to warrant the finding of the jury, and to sustain their verdict.

Anthonie & Marais v. Coit, 40

3. In proving an account of sales made by the plaintiffs for the defendant, certain letters from the former to the latter

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were read to the jury, with the permission of the presiding Judge, not as evidence of the facts therein contained, but as *notice* of facts which might be binding upon the defendant, if his assent to them could be proved. HELD, that these letters came within the rule which excludes a party from testifying in his own favor, and were improperly admitted. HELD also, that although the verdict in all probability would have been the same *without* the letters as *with* them, still a new trial must be granted, because the effect of the improper evidence upon the jury, could not be known by the court. *Id.*

4. If evidence, competent at the time it is offered, be objected to, and the objection overruled, become incompetent by subsequent proof, the objection must be *renewed*, or the party making it will be deemed to have waived his right of excepting.

Mitchell v. Roulstone & Stickney, 351

5. A *joint assumpsit*, against two defendants, cannot be supported without evidence, expressed or implied, that *both* have assented to the contract. If one of the defendants is liable to the plaintiff, and the other *admits* a joint liability with him, such admission (although conclusive as to the party making it) is not sufficient to charge upon the first defendant a *joint* liability with the second. To permit the confessions of the latter to implicate the former, might be to make a contract for him, to which he never assented, and its practical effect might deprive him of an important witness. *Id.*

See ARTICLES OF AGREEMENT. ASSUMPSIT, 1, 4, 5. AWARD, 1, 2, 3, 4, 5. CHARTER PARTY, 4. COVENANT, 1, 2. INSOLVENTS' DISCHARGE, 7. MONEY HAD AND RECEIVED. NEW TRIAL, 2, 3. PARTNERSHIP, 1. PLENE ADMINISTRATIV. RESPONSIBILITY.

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See PRACTICE, 8.

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See CONSPIRACY, 1, 2. DEED RELEASE.
SPECIAL AGREEMENT, 3.

FREIGHT.

See TROVER, 2, 3, 4, 5.

FUND.

See MONEY HAD AND RECEIVED, 2.

G

GAMING.

An action of debt, for money had and received, in the form authorized by the second section of the "act to prevent excessive and deceitful gaming," [1 R. L. 153,] will lie against a stakeholder, to recover money deposited in his hands, upon the event of a trotting match: but the limitation of three months, prescribed by that act, affords a bar to the action; and if pleaded, will protect the stakeholder, as well as the winner.

M'Keon v. Cakerty, 299

GENERAL ISSUE.

A plea, which amounts to the general issue, is bad on special demurrer, and it will amount to the general issue, when it shows a state of facts, from which it appears, that the plaintiff at no time had any cause of action. But when a plea is overruled, as equivalent to the general issue, it must be very clear that it is so.

Richards & Sherman v. Cuyler, 201

See NUL TIEL CORPORATION.

GOODS SOLD and DELIVERED.

See GUARANTY, 3.

GUARANTY.

1. The defendant executed the following instrument of guaranty, in favor of the plaintiff:

New-York, December 5th, 1827.
"Whereas Noah Scovell, of the city of
"New-York, has this day passed to
"John Wheelwright, of the said city,
"his three promissory notes, of which
"the following are correct copies:"
(setting forth the same) "amounting
"together to \$10,590 and 80 cents;
"now in pursuance of the understand-
"ing and agreement between the said

"John Wheelwright and the said Noah Scovell, I do hereby guaranty the just and full payment of the said notes to the said John Wheelwright, or his order, and should any default of payment thereof be made by the said Scovell, I bind myself for the full amount of such default."

The plaintiff proved that Scovell, on the 25th of November, 1827, came to him for the purpose of purchasing a quantity of barilla, and offered the defendant as a surety. That he accepted the terms, sold the barilla to Scovell, and on the 4th of December following, delivered a part of it to him. Scovell gave his notes to the plaintiff for the amount of the barilla, and about three hours after they were given, the notes and guaranty were presented to the defendant, who immediately executed the guaranty, and delivered it to the plaintiff.

HELD, that this was all one original and entire transaction, and that the sale and delivery of the goods to Scovell supported the promise of the defendant, as well as the promise of Scovell, and formed a good consideration for both. HELD also, that the declaration, (which counted on the promise as a collateral one,) being according to the facts of the case, was correct in its form, and in all respects sufficient.

Wheelwright v. Moore, 143

2. The defendant executed and delivered to the plaintiffs a guaranty in the following words: "New-York, 30th April, 1828.—I hereby guaranty the payment of any bill or bills of merchandise, Mrs. P. has purchased, or may purchase of E. P. C. & Co., the said Mrs. P. having the privilege of 90 days' credit on the purchases made by her,—the amount of this guaranty not exceeding \$200, and this guaranty to expire at the end of one year from this date."

HELD, that this instrument was a continuing guaranty, and applicable to any

goods delivered under it, not exceeding the specified amount, during the period limited.

Clark & Clark v. Burdett, 197
HELD also, that a demand of the purchaser, and notice to the defendant, were not necessary as conditions precedent to the plaintiffs' right of action.

Id.

3. In an action for goods sold and delivered, it appeared that the defendant introduced one Mrs. C. to the plaintiff, and directed him to let her have what goods she should at any time want, and charge the same to him, and he would see the plaintiff paid. Goods were delivered accordingly, from time to time, which were charged to the defendant; and Mrs. C. made various payments, which were credited in the account; but a balance having accrued, this action was brought to recover its amount. The Judge charged the jury, that if the plaintiff gave credit to Mrs. C., or if the defendant limited his responsibility to the first purchase, the verdict ought to be for the defendant. But if they believed, that the credit was given originally to the defendant, if it was unlimited in point of time, and had not been countermanded, their verdict should be for the plaintiff. The jury having found for the plaintiff, the charge of the Judge was HELD to be correct; that the case was not within the statute of frauds, and that the plaintiff could recover upon the common counts, for goods sold and delivered.

Graham v. O'Neil, 474

See COVENANT, 1.

H

HUSBAND and WIFE.

The wife of the plaintiff being entrusted by him with certain sums of money, and directed to deposit them in some

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bank for safe keeping, opened an account with the defendants in her own name, and deposited the money in their bank. The defendants were not aware at the time of the deposits, nor until the money had been entirely withdrawn from the bank, that the depositor was a married woman, and they therefore gave her a bank book in the ordinary form, and prescribed the mode in which her checks should be made, as she was illiterate and could not write.

Under this arrangement the wife drew out of the bank, upon checks in her own name, at various times, the entire sums deposited,—and her husband then discovering that his money was gone, brought an action of *assumpsit* against the bank, to recover the amount of the deposits. HELD, that he was not entitled to recover. That the wife, being the agent of the husband to make the deposits, might fairly be presumed to have had authority to withdraw them; but if this were otherwise, as the bank had no notice of the agent's coverture, and as the husband had enabled his wife, by entrusting her with the money, to do the wrong,—that the loss accruing from her breach of trust should fall upon him, rather than upon the bank.

Dacy v. The Chemical Bank, 550

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ILLEGAL CONTRACT.

See SPECIAL AGREEMENT, 2.

ILLEGAL TRANSACTION.

See MONEY HAD AND RECEIVED.

ILLICIT TRADE.

See BARRATRY.

IMPRISONMENT.

See INSOLVENTS' DISCHARGE, 2, 4.

INDEMNITY.

See SPECIAL AGREEMENT, 2.

INDICTMENT.

See MALICIOUS PROSECUTION.

INDORSER and INDORSEE.

See PROMISSORY NOTES, 1, 2, 4.

INDUCEMENT.

See CHARTER PARTY, 2. PRACTICE, 11.

INFANCY.

If upon the return to a *certiorari*, the plaintiff in error rely upon infancy, disclosed by the record, as a defence, it must be specially assigned as *error in fact*, that the defendant in error may take issue upon it.

Hankins v. Kingsland, 425

See INSOLVENTS' DISCHARGE, 6.

INQUEST.

See PRACTICE, 9.

INQUISITION.

See LUNACY.

INSTALLMENTS.

See STOCKS, 3, 4, 5.

INSOLVENTS' DISCHARGE.

1. A plea of an insolvent's discharge, cannot be joined with a plea of *nisi prius*: but the misjoinder can only be taken advantage of by special demurrer, or by motion.

Delavan v. Stanton & Wilbur, 190

2. If a party plead a *judgment*, he must show the certainty of it, setting forth the parties, and the court in which it was obtained. And the plea of an insolvent's discharge ought to set forth the *action*, in which the debtor was imprisoned, the *court* out of which the execution was issued, and the *name* of the creditor upon whose application the proceeding was instituted. *Id.*
3. A defect in the averments of a plea, as to these particulars, is matter of substance, and may be taken advantage of by a general demurrer. *Id.*
4. A plea of a discharge under the 9th sec. of the general insolvent act, [1. R. L. 464,] must aver every fact necessary to give jurisdiction to the officer granting it, and the want of such averments cannot be supplied by the recitals contained in the discharge itself, though the discharge be set forth at large in the plea. By this act it is essential, in order to give the magistrate jurisdiction over the case, that the debtor should have been imprisoned for 60 days upon *execution* in a civil suit. A plea, therefore, which merely set forth, that the debtor was *imprisoned* for 60 days and upwards, on civil suit, was held to be insufficient.
Hildreth v. Shillaber, 237
5. To an action of debt on judgment, the defendant pleaded his discharge under the insolvent act; and the plaintiff replied, that after the discharge was obtained the defendant "assented to, ratified, renewed and confirmed the said judgment and demand of the plaintiff." HELD, that the replication was no departure from the count, and that the new promise was sufficiently laid in the replication. *Id.*
6. The plaintiff declared on a promissory note, bearing date the 20th of June, 1816, and also for goods sold, money paid, &c. The defendant pleaded a discharge under the 9th section of the act, "giving relief in cases of insolvency," passed April 12th, 1813. The plaintiff replied, admitting the discharge, but averring that the consideration of the note arose *out of the state of New-York*, before the passing of the act, and that the plaintiff *then* resided out of the state, to wit, at Philadelphia. The same matters were also set forth relative to the goods, money, &c., specified in the second count of the declaration. The defendant rejoined, stating that "at the time when," &c., he was an *infant* residing in the state of New-York, and so continued until after the passing of the act; and that he resided in said state until after he arrived at the age of 21 years.
Upon demurrer to the rejoinder, it was held to be a *departure* from the plea, and, consequently bad. That the replication was bad, also, for duplicity; but as that defect could not be noticed, except upon a special demurrer, the plaintiff had judgment on the issue.
Roberts v. Kelly, 307
7. To an action of debt on a bond, the defendant pleaded his discharge under the insolvent act. The plaintiff, replied, that the defendant afterwards ratified and confirmed the bond, and waived the benefit of the discharge. To support the issue taken on this replication, the plaintiff produced a paper, signed by the defendant more than two years after his discharge, wherein he agreed that the obligee "might make any settlement he thought proper with one Sexten (for whose benefit the bond was made) without giving up any lien he might have on the defendant for the amount of the bond." HELD, that the proof did not support the replication, and that the agreement was no waiver of the discharge. *Tooker v. Doane,* 532

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8. *Sexten*, it appeared, after the *date* of the discharge, made two payments on the bond; but as it was not shown that they were made with the knowledge or assent of the defendant, it was HELD that no inference unfavorable to him, could be drawn from the acts of *Sexten*. *Id.*

INSURANCE.

1. To an action, for a total loss of freight, upon a policy of insurance, containing the usual special agreement, "that if "the vessel upon a *regular survey*, "should be thereby declared unseaworthy, or incapable of prosecuting "her voyage, by reason of her being "unsound or rotten, the insurers "should not be bound to pay their "subscription," the defendants pleaded, that the vessel upon her outward voyage, sought a port of necessity;— "that a regular survey was held upon "her there;"—that upon such survey, it was thereby found and declared that certain parts of the vessel (in the survey any plea particularly specified) were *rotten*; that other parts (also specified) were so *defective*, "that they "would necessarily require to be shifted;"—that the probable cost of the repairs would amount to \$3000,—and that, in the opinion of the surveyors, the vessel was "unworthy of repairs, "and would not sell for the amount of "her bills;"—whereupon they recommended that she should be sold at public auction, for the benefit of all concerned.

Upon demurrer to this plea, principally upon the ground that the survey did not expressly declare the vessel to be unseaworthy or incapable of proceeding on her voyage, and that the plea sought to draw matters of fact from the jury, and put the finding as to the seaworthiness or unseaworthiness of the vessel, upon the court, by inference to be drawn from particulars stated in

the survey,—the plea was held to be sufficient.

Rogers v. The Niagara In. Co., 86

2. The conclusion of the surveyors, that the vessel was unworthy of repairs; that she would not sell for the amount of her bills, and their recommendation that she should be sold for the benefit of all concerned, were held to be tantamount to a *declaration* in the survey, that the vessel was unseaworthy and incapable of prosecuting her voyage, by reason of unsoundness. And such a declaration upon a regular survey, is, by the terms of the agreement, made conclusive upon the question of seaworthiness, and may be pleaded as a bar to an action upon the policy. *Id.*

3. The defendants, by a policy bearing date the 12th of May, 1826, insured the plaintiffs to the amount of \$5000, for seven years, on "fixtures," placed or to be placed in buildings of their subscribers. By another policy, dated the 2d of December, 1826, the defendants had insured the plaintiffs to the amount of \$2000, on "gas-meters," "placed or to be placed in the city of New-York, for three years." At the date of the first policy, the plaintiffs had placed gas-meters to the amount of \$2000;—but at its *expiration*, their amount had been increased to \$20,000. When the policy on the "fixtures" was made, their value was estimated at \$5000;—but this amount was afterwards increased to \$100,000, and upwards.

The gas-meters and fixtures were subsequently injured by fire to the amount of \$2500, a part of which was upon the "gas-meters and fixtures" placed at the *date* of the policies, and a part upon those which were established afterwards. HELD, that by the true construction of the policies, they covered all "fixtures" to the amount of

- \$3000, whether erected before or after the date of the policies. HELD also, that parol evidence was inadmissible to prove a verbal representation made by an agent, at the time the policies were effected, as to the value of the fixtures intended to be placed by the plaintiffs. *New-York Gas Light Co. v. The Mechanics' Fire In. Co.*, 108
4. The plaintiff effected a policy of insurance against fire, on goods contained in his counting-room, *and after a loss had happened*, he made an assignment of his property for the benefit of certain creditors, and among other things, assigned his claim on the defendants without their consent. HELD, that this transfer did not render the policy void, under the 4th condition of insurance. *Erichia v. The Lafayette In. Co.*, 372
- Among the items of loss allowed by the jury, were certain advances made by the plaintiff, upon some musical instruments, watches, &c., belonging to other persons, which had been deposited with him for sale. As these articles were not stated to be held upon "trust or commission," according to the third condition of insurance, it was HELD, that they were not covered by the policy. *Id.*
5. The terms "stock in trade," when used, in a policy of insurance, in reference to the business of a mechanic, (a baker, for instance,) include, not only the materials used by the mechanic, but the tools, fixtures and implements necessary for the carrying on of his business. *Moadinger v. The Mechanics' In. Co.*, 490
6. The terms "false swearing," (it seems,) as used in the conditions annexed to a policy, mean an intentional and corrupt misstatement, under oath, for the purpose of proving the existence of property not lost, or of overcharging the property destroyed, or concealing that which was saved. *Id.*
7. It seems, also, that silver spoons, and articles of a like kind, used by a family upon ordinary occasions, are not necessarily excluded from the risk by the 8th condition, relative to *plate*, annexed to the policy, but may be included in the terms "household furniture." Query—whether family *portraits* are excluded by the same condition, as *paintings*, to be specified in the policy? *Id.*
8. Where the jury adopt the plaintiff's statement, as to the loss, furnished by the preliminary proofs, without sufficient evidence to support it, the court will grant a new trial, and compel the plaintiff to prove the amount of his loss. *Id.*
9. A description of buildings to be insured, filed in the office of an Insurance Company, and referred to in the policy in general terms, as a report of the situation of the premises, is not to be considered as incorporated into the policy, or as amounting to a *warranty* that the premises insured, shall conform, in all respects, to the description referred to. Buildings represented as finished, in an application for insurance, must correspond *substantially* with such representation; for a material misrepresentation avoids the policy. *Delonguemare v. The Tradesmen's In. Co.*, 589
10. A carpenter, employed constantly in a china factory, in making the racks, shelves, &c., necessary for the proper conducting of the business therein, is not to be considered as a "carpenter at work in his own shop," within the meaning of the memorandum as to the classes of hazards and rates of premiums, attached to the policy; and the

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employment of such a workman by the plaintiff, in the ordinary and necessary business of his manufactory, was held not to avoid his policy. The plaintiff was also allowed interest on the amount insured, from the time the loss became payable, according to the terms of the policy. *Id.*

11. A representation as to the situation of buildings to be insured, in relation to other contiguous buildings, made by the assured at the time of his application for insurance, does not amount to a *warranty* that such buildings are, or that they shall remain, during the continuance of the risk, in the situation described by the representation, unless such representation appear upon the face of the policy.

Stubbins v. The Globe Ins. Co., 631

12. If, upon an application for insurance, the assured describe the premises to be insured, by a diagram, or otherwise, and represent the ground contiguous to such premises, as "*vacant*," such representation does not amount to a *warranty* that the contiguous ground shall remain vacant during the continuance of the risk; neither is the assured prevented from building upon such vacant ground, by any prohibition in the policy, express or implied. *Id.*

13. A fraudulent concealment of circumstances *material to the risk*, will vitiate the policy; and the assured cannot recover in *any case*, where the loss is occasioned by his own fraudulent, improper, or negligent acts. *Id.* See *ASSUMPSIT*, 1, 2, 3. *EVIDENCE*, 5.

14. Evidence as to a usage existing at New-York, that upon the occurring of any circumstance, whereby the risk is increased by the act of the assured, after the effecting of the insurance, notice thereof shall be given to the assurers, so that they may have the option of continuing the policy, or annul-

ling it, cannot be received to alter the legal effect or operation of the contract. *Id.*

See *BARRATRY. MONEY HAD AND RECEIVED*, 2. *PRACTICE*, 11.

INTEREST.

See *LUNACY*.

INTEREST OF A WITNESS.

See *EVIDENCE*, 1. *PLENE ADMINISTRATIVIT*.

INVENTORY.

See *PLENE ADMINISTRAVIT*.

ISSUE.

See *CHARTER PARTY*, 2. *PRACTICE*, 11.

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JOINT ASSUMPSIT.

See *EVIDENCE*, 5.

JOINT DEBTORS.

See *PRINCIPAL and AGENT. SHIPS and SHIPPING*, 5, 6, 9.

JOINT OWNERS.

See *SHIPS and SHIPPING*, 5, 6, 9, 10.

JOINT PROMISE.

See ASSUMPSIT, 1, 2, 3. *EVIDENCE*, 5.

JUDGMENT.

See *DEBT ON JUDGMENT. INSOLVENTS' DISCHARGE*, 4. *PRACTICE*, 4, 11.

JURISDICTION.

See *ABATEMENT. DEBT ON JUDGMENT*, 2, 3. *INSOLVENTS' DISCHARGE*, 4.

L**LACHES.**

See BILLS OF EXCHANGE. PROMISSORY NOTES, 4.

LETTERS.

See AWARD, 2. EVIDENCE, 3.

LIBEL.

1. In every action for a libel, a *publication* of the libellous matter must be distinctly averred: and it will not be sufficient to allege, that the defendant composed, wrote, and *delivered to the plaintiff* a certain false, malicious, and defamatory libel, but it must appear upon the face of the declaration, that the libel was, in some form, made public. *Waistle v. Holman,* 172

2. It is not necessary, however, to aver, in direct terms, that the libel was communicated to third persons, but it will be sufficient to allege, that the defendant *published*, and caused to be published, a certain libel, although it also appears that it was addressed to the plaintiff. *Id.*

LICENSE.

See PHYSICIAN.

LIEN.

See TROVER, 2, 3, 4, 5.

LIQUIDATED DAMAGES.

See COVENANT, 1, 2.

LOAN.

See RESPONDENTIA. RESTRAINING ACT. MALICIOUS PROSECUTION.

LOCAL ACTION.

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See ABATEMENT.**LOSS OF MARKET.**

See CHARTER PARTY, 3.

LOTTERIES.

See MONEY HAD AND RECEIVED.

LUNACY.

1. The lunacy of a person who has executed a power of attorney, does not operate to revoke it,—at least, until the fact of his lunacy has been properly established by an inquisition. *Wallis v. The Manhattan Bank,* 495

2. The plaintiff having deposited in the bank of the defendants, certain sums of money, executed a general power of attorney in favor of his brother, and afterwards became lunatic. The attorney attempted to draw the money, thus deposited, out of the bank, by virtue of his power; but the defendants refused to honor his checks, in consequence of the lunacy of the principal, who was then in an asylum for madmen; but there had been no inquisition, nor proceedings in chancery, for the appointment of a committee of his estate. HELD, that the power was not revoked by the lunacy of the plaintiff, and that the defendants were bound to pay interest on the deposits, from the commencement of the suit to the time of the judgment. *Id.*

M**MALA FIDE POSSESSIO.**

See PROMISSORY NOTES, 6.

In an action for a malicious prosecution,

it appeared that the defendant presented himself, with several witnesses, before the Grand Jury, which indicted the plaintiff, and gave oral testimony, charging him with having committed the crime of perjury. The District Attorney, by direction either of the defendant or his counsel, (it did not clearly appear which,) laid a certain affidavit, made by one W., (who was dead,) before the Grand Jury, who returned it to him, with directions, that an indictment should be drawn against the plaintiff. The District Attorney thereupon drew an indictment, founded upon the affidavit of W., *exclusively*; and upon that indictment, the plaintiff was eventually tried and acquitted.

Between the time of the finding of the bill and the trial of the cause, the defendant caused the trial to be put off, upon an affidavit of his own, stating the absence of a material witness; and when the trial came on, his counsel discovered, for the first time, that the perjury alleged in the indictment, differed from that charged by the oral proof, laid before the Grand Jury, and that the indictment could not be supported. They therefore abandoned the prosecution, and the plaintiff was acquitted.

Upon the trial of the action for a malicious prosecution, the Judge charged the jury, that if the defendant had no probable cause for his accusation, he could not be excused from the consequences of *prosecuting* the indictment, even if he were under a misapprehension as to the specific charge contained in it, or ignorant of its contents.

Held, that this direction was incorrect, although the defendant would be liable for *prosecuting* the indictment, if aware of its contents, even if it did assign a perjury differing from that charged by himself.

Held also, that the defendant would be liable, if the affidavit of W. was sent before the Grand Jury by him, or by his direction; but that he might defend

himself by showing that there was probable cause for the charge actually made by him before the Grand Jury; although that defence would not be a complete one, unless it showed a probable cause for the whole charge.

Candler v. Petit, 315

MARINE COURT.

See DEBT ON JUDGMENT, 3.

MEDICINE.

See PHYSICIAN.

MISJOINER.

See INSOLVENTS' DISCHARGE, I.

MISNOMER.

A mistake in the declaration, as to the Christian name of a *plaintiff*, is not a ground of nonsuit at the trial; and such mistake cannot be taken advantage of, except by a plea in abatement.

Collman et al. v. Collins, 569

MISTAKE.

See MONEY PAID, 1, 2. *VENDOR and PURCHASER*, 1, 2.

MONEY HAD AND RECEIVED.

1. The plaintiff recovered a judgment for 5000 dollars against different persons, in an action of trespass *de bonis asperatis*; but no execution was ever issued upon, nor was any satisfaction ever obtained of, the judgment. The defendant received into his possession the goods, (or a part of them,) which were the subject of the action of trespass,—sold them, and took the proceeds. In an action of *assumpsit* against him, for money had and received, (being the proceeds of the goods sold,) it was **Held** that the action was well brought, and could be sustained.

Sturtevant v. Waterbury, 449

a. One M'Kibben, having a claim upon a Fire Insurance Company for a loss, put his policy into the hands of the defendant, (an attorney and counsel of the court,) for collection,—and the defendant gave him a certificate that the policy was in his possession for that purpose. Upon this certificate, M'Kibben made an endorsement, authorizing the defendant to hold the policy subject to the order of Kane, and delivered the same to him.

The defendant then commenced a suit on the policy, recovered and received the sum of 1400 dollars thereon, and the intestate gave him a written notice of his claims upon M'K., which appeared to be, chiefly, for certain notes, drawn by him and indorsed by one Hill.

The defendant, not deeming it prudent to pay over the money thus received, to the administrator of Kane, an action was brought against him by the administrator, to recover the amount collected on the policy.

At the trial, the plaintiff did not produce the notes, and the Judge, holding that there could be no recovery until the notes were produced or accounted for, nonsuited the plaintiff. HELD, that the order made by M'Kibben, with the notice to the defendant of the intestate's claim under that order, created an equitable assignment of M'K.'s cause of action, and that he had a right, *prima facie*, to receive the fund without producing the notes. The nonsuit was therefore set aside. *Hamilton, adm'r. of Kane v. McCoun*, 522

3. The defendant sold a ticket to the intestate, in a lottery unauthorized by the laws of this state, which drew a prize of 50,000 dollars. The defendant caused the prize to be discounted for the intestate, who, upon the close of the transaction, permitted him to retain 10,000 dollars by way of loan, for which the defendant gave his own promissory notes to the intestate. An

action for money had and received, being brought to recover the amount thus retained, the defendant set up the illegality of the transaction, under the lottery act, as a defence. HELD, that the loan of the money formed a good consideration for the assumpsit, and that the illegality of the original acts of the intestate and the defendant, in the purchase and sale of the ticket, could not be introduced as a defence to the action. *The same v. Canfield*, 526

See GAMING.

MONEY PAID.

1. It is a general principle, that if one person pay money to another, under a mistake of fact, without any legal obligation to do so, and without the means of ascertaining the truth; or if he be induced to pay it under false representations, he may recover back the money thus paid, in an action of *assumpsit*. *Potter & Russell v. Everett & Kees*, 252

2. The defendants, merchants in England, and the correspondents of the plaintiffs, merchants in America, received orders from the latter to purchase a quantity of goods, on their account, and pay for them by drawing bills on S. Williams, (a banker in London, with whom the plaintiffs had placed funds for that purpose,) at 60 and 90 days' date. The defendants purchased the goods, and drew upon Williams for the amount; but made one of the bills for 500*l.*, payable at *four months*. Williams failed before this bill came to maturity, having considerable funds in his hands, belonging to the plaintiffs. W. H. R., an agent of the plaintiffs in England, not knowing that the bill at four months was drawn contrary to orders, but believing that the plaintiffs were bound to provide for it, (the defendants having threatened to attach the goods and funds of

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the plaintiffs in England, if it were not paid,) took up the bill without the knowledge, orders or consent of the plaintiffs. The plaintiffs, as soon as the facts of the case came to their knowledge, protested against the conduct of the defendants, and afterwards brought an action of assumpsit, to recover back the amount of the bill. HELD, that they were entitled to recover. *Id.*

See STOCKS, 1.

MORTGAGE OF CHATTELS.

1. Where personal property has been mortgaged, the possession may in some instances remain with the mortgagor; especially where such a course is rendered proper and expedient from the nature of the property, and the objects of the parties in making the mortgage. *Lewis v. Stevenson,* 63
2. But if the mortgagor, while in possession, sell or pledge the property to a *bona fide* purchaser, or pledgee, who is ignorant of the mortgage, and has no cause for suspicion or inquiry, and deliver the possession, the sale or pledge will be good, and the rights of such a purchaser or pledgee are paramount to those of the mortgagee. *Id.*
3. The defendant, a pawn-broker, advanced certain sums of money to a son of the mortgagor, for the use of the family of the latter, and inadvertently received plate, linen, &c., in pledge, which had been conveyed to the plaintiff by way of mortgage, and neglected to make any inquiry as to the authority of the pawn, although there were circumstances to excite suspicion. HELD, that the mortgagee had a right to reclaim the property out of the hands of the pawn-broker. *Id.*
4. Where personal property is put into the hands of trustees, by a borrower

of money, as security for a loan made to him, by a third person; an appropriation, by the trustees of a part of the proceeds of the property, to an object not expressly mentioned in the deed of trust, made with the assent of the borrower and the lender, cannot be questioned by the parties to the loan. *Id.*

MORTGAGE OF SHIPS.

See EVIDENCE, 1. SHIPS and SHIPPING, 1, 2, 3, 4.

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NEW AGREEMENT.

See ARBITRATION BOND.

NEGLIGENCE.

See ACTION ON THE CASE, 1.

NEW PROMISE.

See INSOLVENTS' DISCHARGE, 5.

NEW TRIAL.

1. Where a new trial is granted, not from any mistake or misdirection on the part of the Judge, but in consequence of an error or incorrect finding by the jury, the party moving to set aside the verdict, is bound to pay the costs. *Birkbeck v. Burrows,* 51
2. The jury must pass upon all the facts proper for their consideration, and if they have not done so the court will grant a new trial, without considering on which side the weight of evidence lies. *Gouverneur et al. v. Elliott & wife.* 111
3. Newly discovered evidence, which is cumulative merely, is never the ground of a new trial, especially where a part of it was in the knowledge of one of the witnesses, examined at the trial, but not disclosed by him. *Wheelwright v. Beers,* 391

See EVIDENCE, 3. INSURANCE, 8. NON-SUIT. PRACTICE, 2.

NONSUIT.

If upon the trial of the cause, the plaintiff refuse to submit his case to the jury, after the testimony is closed, and insist upon being nonsuited, in consequence of the ruling of the presiding Judge upon points of evidence, he will not afterwards be permitted to make a case, on which to found a motion for setting the nonsuit aside.

Forbes v. Luyster, 403

See CHARTER PARTY, 4. MISNOMER. MONEY HAD AND RECEIVED, 4. PROMISSORY NOTES, 6,

NOTICE.

See APPLICATION OF PAYMENTS, 2. EVIDENCE, 3. MONEY HAD AND RECEIVED, 2. PROMISSORY NOTES, 1, 2, 4. SHIPS AND SHIPPING, 6. STOCKS, 5.

NUL TIEL CORPORATION.

A plea of *nul tiel corporation*, is bad upon special demurser, as amounting to the general issue : for whatever the plaintiff is bound, in the first instance, to prove, in order to support his cause of action cannot be specially pleaded by the defendant. And this principle applies as well to foreign corporations, as to our own. *Farmers' and Mechanics' Bank v. Rayner,* 195

NUL TIEL RECORD.

See INSOLVENTS' DISCHARGE, 1.

NUNC PRO TUNC.

See PRACTICE, 9.

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OATH.

See SHIPS AND SHIPPING, 1.

OFFICER.

See TROVER.

ORDER.

See BILLS OF EXCHANGE. MONEY HAD AND RECEIVED, 2. PRACTICE, 5.

OWNERSHIP OF VESSELS.

See SHIPS AND SHIPPING, 1, 2, 7.

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PAROL PROOF AND AGREEMENTS.

See AWARD, 1. INSURANCE, 3. RESPONDENTIA. SHIPS AND SHIPPING, 2, 6.

PARTNERSHIP.

See DEBT ON JUDGMENT, 2.

1. Where two or more, are charged as partners, articles of agreement, between them, are admissible in evidence, (although not conclusive,) for the purpose of showing what the true nature of the connexion between the parties was, at the time it commenced ; but their declarations made at a subsequent period, would not be admissible. *Mitchell v. Roulstone & Stickney,* 351
2. The plaintiff employed the defendant to procure consignments for him, and to act as his agent in certain mercantile business, to be carried on in the name of the plaintiff. The defendant, as a compensation for his services, was to receive one half of the profits of the business ; but he had no authority to contract debts in the name of the plaintiff, nor was he to be liable to third persons for any responsibilities created for the concern. No profits were ever realized, but on the contrary, losses ensued, and the plaintiff brought an action of *assumpsit* against the de-

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fendant for money had and received to his use, as appeared by the books, which the defendant had kept. HELD, that the foregoing facts did not constitute such a partnership between the parties, as would bar the action at law; and the plaintiff having recovered a verdict against the defendant, for the balance of his account, the court refused to set it aside.

Ross v. Drinker, 415

PATENT MEDICINES.

See PHYSICIAN.

PAYMENTS.

See APPLICATION OF PAYMENTS, 1. INSOLVENTS' DISCHARGE, 7. SHIPS and SHIPPING, 10.

PAWN-BROKER.

See MORTGAGE OF CHATTELS, 3.

PERFORMANCE.

See COVENANT, 1, 2. CHARTER PARTY, 4. PLEAS and PLEADING, 1. RESPONDENTIA.

PERILS OF THE SEAS.

See CHARTER PARTY, 1, 2.

PETITION.

See PRACTICE, 6.

PHYSICIAN.

The plaintiff brought an action of assump^t for work and labor bestowed by him as a physician, surgeon and apothecary, on the defendant's wife, and for the *medicines* found and applied by him in the course of his attendance as such physician. It appeared, at the trial, that the plaintiff had no license, authorizing him to practice, but was employed by the defendant to at-

tend upon his wife, and in the course of such attendance, furnished a quantity of medicines, for the preparing of which, he had obtained a *patent*; and he sought, in this action, to recover a compensation for his services, as a physician, and also for his *medicines*. HELD, that he was not entitled to recover any part of his claim,—not even for the patent medicines furnished in the course of his attendance.

Smith v. Tracy, 465

PLAINT.

See DEBT ON JUDGMENT, 3.

PLEAS AND PLEADING.

The declaration alleged, that it was agreed between the plaintiff and the defendants, 1. That the plaintiff should subscribe for and take 80 lots of ground, in a certain tract in the city of N. Y. "agreeably to the conditions, as set forth in said articles of subscription." 2. That he should pay over, at the meeting of the *said subscribers*, for the division of said lots, a certain sum of money. 3. That the defendants should allow to the plaintiff, on the settlement for said lots, a certain sum as commissions, &c. It then averred a performance, on the part of the plaintiff, in the words of the agreement, as set forth, and assigned, as a breach, the nonpayment of the sum to be allowed as commissions. Upon general demurrer to this declaration, for the want of a sufficient statement of the cause of action, it was held to be sufficient, although liable, perhaps to objections, upon special demurrer.

Smith v. Wiswall & Price, 469

See ABATEMENT. ARBITRATION BOND. CHARTER PARTY, 1, 2, 4. CONSPIRACY, 1, 2. COVENANT, 3. DAMAGES. DEED. DEBT ON JUDGMENT. GENERAL ISSUE. GUARANTY. INSOLVENTS' DISCHARGE, 1, 2, 3, 4, 5, 6, 7.

INSURANCE, 1, 2. LIBEL, 1, 2. MISNOMER. NUL TIEL CORPORATION. PRACTICE, 11. RESPONDENTIA. TENDEE.

PLEDGE.

See MORTGAGE OF CHATTELS, 2, 3.

PLENE ADMINISTRAVIT.

The plaintiff in error, being sued, in the Marine Court, as administratrix of her husband, on a promissory note made by him, pleaded *non-assumpsit* and *plene administravit*. To support the last plea, she called her son, as a witness, and offered to prove by him, the payment of certain of the debts of the intestate by her, in the due course of administration; and by another witness, that the estate had been over-valued.

The defendant in error, contended that the administratrix must first produce the inventory of the estate, before she could offer such evidence; and the court below, rejected the testimony as incompetent. HELD, that the burden of the issue was on the plaintiff, in the original suit, who should have produced a copy of the inventory from the public records, if he wished by it, to charge the administratrix with assets. HELD also, that although no person can be a witness to increase a fund, in which he is interested, yet, that the son of the administratrix was competent to answer the questions proposed to be put to him. *Vullee v. Rayner,* 376

PORT OF NECESSITY.

See CHARTER PARTY, 1.

POSSESSION.

See MORTGAGE OF CHATTELS, 1, 2. SHIPS and SHIPPING, 3.

POWER OF ATTORNEY.

See LUNACY, 1, 2, 3.

PRACTICE.

1. A case made can never be turned into a special verdict, or bill of exceptions, unless the right to do so, is reserved at the trial.

Lewis v. Stevenson, 248

2. Where a verdict has been taken, subject to the opinion of the court upon a case, with the assent of both parties, and the court, in deciding on the case, give a judgment founded on *facts*, rather than questions of law, a new trial will not be granted upon the ground, that *one* of the parties *supposed* that the case would be decided upon questions of law, and did not, therefore, make his proof as strong before the jury as he might have done. *Id.*

3. Double pleas must be signed by counsel,—and if a default be entered against a defendant, who has served double pleas, without the signature of counsel, the court will not set it aside, except upon an affidavit of merits.

Barrow v. Sabbaton, 348

4. Where a Justice, having decided in favor of the defendant, upon the merits, taxes his costs, but includes in them a part of the costs of the *plaintiff*, and gives judgment for the whole amount, the judgment may be *reversed* as to the costs, and *affirmed* as to the residue. *Jones v. Archer,* 349

5. Where an order has been granted for a stay of proceedings, after a trial, in order to enable the defendant, against whom a verdict has been obtained, to make a case upon a bill of exceptions, a Judge, at chambers, may, upon cause shown, so far modify the order, as to enable the plaintiff to perfect his judgment and issue his execution, without a levy, that the same may stand as security. *Garrelson v. Hemstead,* 514

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6. A petition for a discovery, under the provisions of the revised statutes, (vol. 2, p. 199,) must present a proper case for the equitable interposition of the court, or it will be denied. And where the petitioner can have all the relief the nature of his case requires, by pursuing the ordinary practice of the courts of law, the power of compelling a discovery, conferred by the statute, will not be exercised.
McKeon v. Lane, 520
7. A motion for a retaxation of costs in this case was allowed, with directions, that in all cases where the opposite party requires it, the names of the witnesses who attend at a trial, or reference, shall be inserted in the affidavit of attendance ; and that no fees be allowed to attorney or counsel, for attending at any adjourned meeting of referees, unless such adjournment shall be made on the application of the adverse party, or shall have taken place after a long interval of time, when from the absence of a referee, or other sufficient cause, no meeting has been held. *Jones v. Van Ranst,* 530
8. Where foreign plaintiffs become insolvent after the commencement of a suit, and the 100 dollars, required by the 55th rule of this court, are deemed an inadequate security for the costs which may accrue, the court will compel the plaintiffs to file proper security for the costs, and will stay proceedings until the security be furnished. *Bomcisler v. The National In. Co.,* 531
9. Where the attorney for the plaintiffs, through inadvertence, neglects to file a replication to the defendant's plea of payment, and takes an inquest against him before the pleadings are formally closed ; the court will, under proper circumstances, permit a replication to be filed after the inquest, *nunc pro tunc.*
Lockwood v. Flanagan, 545
10. But where the defendant's attorney was aware of the fact, that the replication was not filed, and lay by for the purpose of availing himself of the defect, and then, upon the plaintiff's application, for leave to file his replication, *nunc pro tunc,* the defendant himself swore to a defense upon the merits, the court refused to allow the replication to be thus filed, but compelled the defendant to pay all the costs of the inquest and the motion, as a condition upon which the plaintiff's application was refused. *Id.*
11. To an action upon a policy of insurance, the defendant pleaded the general issue and three special pleas in bar. The plaintiffs took issue upon the three first pleas, but demurred to the fourth. Upon the argument of the demurrer, the court gave judgment in favor of the defendants, with leave to the plaintiffs to withdraw their demurrrer and take issue upon the plea. The plaintiffs, however, under the advice of counsel, went to trial upon the issue joined upon the three first pleas, taking no notice of the fourth plea, and the defendants entered up the judgment in their favor upon the demurrer.
- At the trial of the cause upon the issues under the three first pleas, the presiding Judge decided that the fourth plea covered the whole cause of action exhibited in the first count of the declaration ; and as that plea had been decided to be good, and the plaintiffs had permitted the defendants to enter up their judgment upon it, he excluded all the testimony offered to support the count, and the plaintiffs were compelled to submit to a verdict against them.
- Upon application to the court, setting forth that all the proceedings in the case had been under the advice of counsel, who supposed that the plaintiffs could proceed to trial under the other issues, without any embarrassment from the fourth plea, and the de-

termination of the demurrer to it,—the court, notwithstanding the intervention of three terms between the rendition of the judgment on the demurrer and the verdict, set the verdict aside, upon the condition that the plaintiff should pay all the costs which had accrued, and take issue upon the fourth plea without delay.

Rogers v. The Niagara In. Co., 559

See COMMISSION. EVIDENCE, 4. NON-SUIT. VERDICT, 4.

PRINCIPAL AND AGENT.

The plaintiff, with one M'D., entered into an agreement, under seal, with the N. Y. Hydraulic Manufacturing and Bridge Co., (a private association under that name,) to construct two bulkheads, connected with a canal, which the Company was about to make. This agreement was executed by the defendant, Campbell, as President of that Company, and by Rhinelander as Treasurer; and was declared to have been entered into "agreeably to their 'articles of association.'" In addition to the work which was done, under the contract, the plaintiff, by the direction of Campbell and Rhinelander, performed other labor in excavating the canal, for which he brought an action of assumpsit against ALL the associates. The Company was formed under certain articles of association, which provided that persons having dealings with the Company, should not have recourse for their debts against the separate property of its members, but should be considered as giving credit to their joint funds solely; and that the trustees or agents of the Company should have no authority to bind it by any contract, unless it contained a restriction to the effect aforesaid.

The defendants insisted, that the reference in the agreement to the articles of association, was sufficient to charge VOL. II.

the plaintiff with notice of their articles, and that he could not, under any circumstances, recover a judgment against the defendants *jointly*, as they were not partners, and as Campbell and Rhinelander had no power to bind them.

HELD, that the plaintiff having performed labor for the benefit of the associates, might maintain an action upon a *quantum meruit*, either against the agents, as having made themselves personally liable, or against the individuals composing the association; and the plaintiff had judgment against all the defendants.

Sullivan v. Campbell et al., 271

PROMISE.

See CONSIDERATION, 1, 2, 3, 4.

PROMISSORY NOTES.

1. The holder of a promissory note, who receives and indorses it for the sake of collection only, although a mere agent, is to be considered as the *real* holder, for the purpose of receiving and transmitting notices.

Ogden et al. v. Dobbin & Evans, 112

2. When a note has been presented for payment and payment is refused, the holder acts with reasonable diligence, if he gives notice by the regular course of mail, to the indorser from whom he received it, that he may transmit notice to his immediate indorser, who may take the same course as to the prior indorsers. And if the indorsers, in due season, adopt the regular course of the mail, for transmitting notices from one to the other, and by that means the route to the first indorser is made circuitous, it is no want of diligence on their part; and he cannot set up the manner of the giving of the notice and the delay occasioned by it, as a defence.

Id.

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3. When a note is made payable at a particular place, it must be presented at that place for payment. But when it is made payable at a *bank*, and the note is placed in the hands of the cashier of that bank for collection, there is no necessity for his making a specific, or clamorous demand. The legal requirements, as to presentation and demand are complied with, if the note was in the bank at the time it fell due, in the hands of the cashier, who was ready to receive the money.

Id.

4. The defendant endorsed a promissory note, payable *on demand*, made to secure the payment of a sum of money loaned to one of the makers, by the plaintiff. The note was not made for commercial purposes, nor was it ever negotiated, and the holder resided out of the state of New-York. At the end of 19 months from its date, demand of payment was made, which being refused, notice was given to the indorser, who claimed to be discharged by the laches of the holder.

HELD, that the rule requiring promissory notes, payable *on demand*, to be presented within a "reasonable time" is applicable, chiefly to those which are made for commercial purposes. That the present was to be likened to a case of guaranty or suretyship, and that the defendant was liable on his indorsement. *Vreeland v. Hyde*, 429

5. Where a note is payable to bearer, or endorsed in blank, an action on it may be maintained in the name of any person, without the plaintiff's being required to show that he has an interest in it, unless he possesses the note under suspicious circumstances. If any question as to *mala fide possession* arise, that is a matter of fact, to be raised by the defendant and submitted to a jury.

Ogilby v. Wallace,

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6. Where, therefore, in an action upon a promissory note, payable to order and indorsed in blank, the plaintiff upon the record was a *fictitious* person, and the Judge for that reason nonsuited him at the trial, although the note appeared to be the property of a real party whose name was disclosed; the court directed the nonsuit to be set aside, that the questions of fact connected with the possession and prosecution of the note, might be submitted to a jury. *Id.*

See ASSUMPSIT, 6. CONSIDERATION, 3. GUARANTY. INSOLVENTS' DISCHARGE, 6. MONEY HAD AND RECEIVED, 2, 3. RESTRAINING ACT. SHIPS and SHIPPING, 9, 10. TENDER.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

PROOF.

See CHARTER PARTY, 4.

PUBLICATION.

See LIBEL, 1, 2.

PUBLIC POLICY.

See SPECIAL AGREEMENT, 2.

PURCHASER.

See MORTGAGE OF CHATTELS.

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RECEIPT.

See SHIPS and SHIPPING, 10.

RECORD.

See ABATEMENT.

REGISTRY OF VESSELS.

See EVIDENCE, 1. SHIPS and SHIPPING, 1, 2.

RELEASE.

To an action of *assumpsit*, to recover the balance of an account, the defendants pleaded a *release*, under the seal of the plaintiffs. The plaintiffs replied, that the release was obtained from them, by the fraud and covin of the defendants,—on which issue was joined. At the trial, the plaintiffs, to support this issue, offered to show fraud, on the part of the defendants, in the *consideration*, on which the release was founded. The defendants contended, that the proof ought to be confined to fraud, in the *execution* of it only, and that if such fraud was not shown, the release was a flat bar at law. HELD, that the position of the defendant's counsel, was fully supported by the decisions of our own courts.

Belden v. Davies, 433

REMOVAL OF CAUSES.

See BOND.

REPLICATION.

See CHARTER PARTY, 2. DEBT ON JUDGMENT, 2. INSOLVENTS' DISCHARGE, 6. PRACTICE, 9.

REPRESENTATION.

See INSURANCE, 3, 9, 10, 11.

RES GESTÆ.

See CHARTER PARTY, 4.

RESTRAINING ACT.

The plaintiffs loaned to J. L. 500 dollars, upon his check for the same sum, collaterally secured by the deposit of a

promissory note, indorsed by the defendant. The sum advanced to L. consisted of small checks, drawn by the plaintiffs on the Tradesmen's Bank, having the general appearance of bank notes, and being intended to circulate as such. They were not redeemed at the bank on which they were drawn, but by the plaintiffs themselves, at their own office. L. having failed to repay the loan, the plaintiffs brought an action on the note, to which the indorsers set up the illegality of the transaction, under the restraining act, as a defence. HELD, that the giving of the checks under the circumstances of the case, was *not* a banking transaction, nor against the restraining act, and that the plaintiffs were entitled to recover. Utica In. Co. v. Paradow, 515

REPAIRS OF VESSELS.

See CHARTER PARTY, 1, 2. INSURANCE, 1, 2. SHIPS and SHIPPING, 1, 2.

RESPONDENTIA.

The plaintiffs loaned to the defendant, Searle, \$15,000, upon goods on board the brig Ocean, whereof S. was master, and received from all the defendants, a respondentia bond, as security for that loan. The vessel was bound from New-York to Calcutta, and from thence back to New-York, with liberty to touch at Madeira, on the outward passage. By the first condition of the bond, the vessel was to proceed with all convenient speed on her voyage, which was to terminate within 18 months; II. She was to have on board during the whole voyage, the stipulated amount of property; III. The voyage was to be performed *without deviation*; and by a further condition, the defendants were to pay the \$15,000 on the return of the vessel, or at the expiration of 18 months from the date

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of the bond, whichsoever should first happen.

The time stipulated in the bond being expired, and the vessel not having returned, the plaintiffs brought an action of debt on the bond, to which the defendants (with the exception of Searle, who was not arrested) *pledaded*, that after the brig sailed on her voyage, and before she arrived at Calcutta, the plaintiffs, in consideration of an additional premium of \$300, agreed with the defendants, as *sureties* for Searle, that the vessel should have liberty to proceed from Madeira to the Canaries, and a port or ports in South America, India, or elsewhere, and from thence to a port in the U. States. That the vessel proceeded from Madeira *on the voyage last mentioned*, was then prosecuting it with all reasonable dispatch, and had not returned to the United States at the time the action was commenced.

Upon *demurrer* to these pleas, it was HELD, that the new agreement made with the sureties, did not vary or alter the terms of the original contract, any further than to preclude the plaintiffs from taking any advantage of a *deviation* from the voyage prescribed in the condition of the bond. That it authorized a change in the course of the voyage, but did not extend the time for its performance, and the plaintiffs had judgment on the demurrer.

As the new contract was not under seal, square, whether the terms of the bond could be varied by the parol agreement? And if so, whether the pleas themselves are good? *The Niagara In. Co. v. Searle et al.*, 22

ROTTEN CLAUSE IN A POLICY.

See INSURANCE, 1, 2.

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SALE.

See ASSUMPSIT, 6. *TROVER*, 2, 3. *VEN-
- DOR AND PURCHASER*, 1, 2.

SEAWORTHINESS.

See CHARTER PARTY, 1, 2.

SECURITY.

See PRACTICE, 5.

SHIPS AND SHIPPING.

1. The registry of a vessel at the Custom House, although accompanied by the oath required by law, of the person in whose name the registration is made, is not conclusive evidence that the ownership of such vessel is in him. The registry does not determine the ownership of the vessel, its object being merely to show her national character, and to secure the advantages belonging to vessels of the United States. *Ring & M'Namara v. Franklin*, 1
2. The mortgagee of a vessel out of possession, is not liable for repairs, unless they are made upon his credit, or by a special contract with him; and parol evidence is admissible to show, that the bill of sale whereby the vessel is conveyed, although absolute upon its face, was, nevertheless, intended as a mortgage. The agreement which operates as a defeasance, need not be under seal; nor is it necessary that it should be made or executed simultaneously with the deed, in order to give it validity. *Id.*
3. A mortgagee of a vessel, out of possession at the time supplies for her are furnished, but who takes possession subsequently, is not liable for the supplies furnished before his possession commenced. *Birkbeck v. Tucker et al.*, 121
4. Although the bill of sale, or instrument by which the mortgagee exhibits his title, be absolute upon its face, he may show, nevertheless, by parol evidence, what the real nature of his interest

- was ; and it is not necessary that the *deceasance* (or evidence, showing the apparently absolute interest, to be a mortgage) should be in *writing*. *Id.* in an action by a third person, for the purpose of showing that another of the joint owners had fulfilled all his stipulations with such owner, and had paid for his proportion of the vessel? *Id.*
5. Where an action was brought against the defendants *jointly*, and all of them, except one, admitted their liability, it was held that the plaintiff was not entitled to recover against those who admitted their liability, without convicting him also, who made defence.
6. Notice was given to the defendant, who contested the plaintiff's right to recover against him, to produce certain books relative to the vessel, which were kept by the ship's husband,—the other defendants admitting that they were in his possession. HELD, that their admissions would not affect the defendant, who made the defence, but that the plaintiff was bound to prove the books to be in his hands, before parol evidence of their contents could be offered.
7. P., one of the defendants, agreed with R., another of the defendants, in the month of July, 1825, to purchase one fourth part of a ship of him, which had performed but one voyage, at one fourth of her original cost, and to come in as a part owner from the beginning. He was accordingly debited by R. with that amount, and credited with one fourth part of the profits of the voyage. HELD, that this purchase did not constitute P. such an owner from the beginning, as to make him liable for bills of the ship, which had accrued before the voyage was performed.
Higgins v. Packard et al. 226
8. *Quare*, as to the effect of taking the promissory note of one of several joint owners, for a debt of the whole? *Id.* An action being brought for a breach of this contract, it was HELD, that the case presented a sufficient consideration for the agreement, and that the
10. In an action of assumpsit against several joint owners of a ship, for work and labor performed in rigging her, it appeared that the plaintiff had taken the promissory note of one of the joint owners, payable sixty days after date, for the amount of his bill, and given him a receipt in full of all demands, up to a certain date. The Judge charged the jury, that the taking of the note, under the circumstances of the case, was not a discharge of the plaintiff's claims against the other owners, unless it was taken in fact, as payment, and with the intent to discharge the other owners. HELD, that this charge was correct in point of law.
Higgins v. Packard, 547

See CHARTER PARTY, 1, 2. EVIDENCE, 1.

SPECIAL AGREEMENT.

1. The defendant agreed, by parol, with the plaintiff, that if he could purchase and deliver to him the notes of the New-Jersey Manufacturing and Banking Co., and pay a certain sum for discounting them, that he (the defendant) would take of the plaintiff all the notes of that Co. which he should so purchase, and pay him the amount thereof, deducting the discount. The plaintiff, under this agreement, purchased such notes from time to time, which were taken by the defendant on the stipulated terms, until finally an amount, which the plaintiff had on hand, being offered to the defendant, he neglected to pay for the same, and on that day, the bank failed.

plaintiff had a right to recover, under it, the amount of all such notes as he had received in the regular course of his business, and in which he had a complete right of property, at the time the bank stopped payment.

Smith v. Spies, 477

2. A contract, made as an indemnity against the consequences of an illegal or immoral act, *to be done at a future period*, is void, on principles of public policy; but a person may indemnify himself by contract, against the consequences of an unlawful act, *already done*. *Kneeland v. Rogers,* 579

3. The declaration, in this case, contained seven special counts, the second of which, set forth, that an action had been commenced against the plaintiff, relative to a sale of cotton, made by him, as the agent and factor of certain persons residing in Alabama, who were liable to indemnify the plaintiff against the consequences of such sale; and that the defendants, in consideration of a sum of money paid to them by the plaintiff, at the request of his principals in Alabama, promised to indemnify him against said action. It then averred that a judgment had been recovered against the plaintiff, the amount of which he had been compelled to pay, and that the defendants had never indemnified him, &c.

The defendants pleaded the general issue to the whole declaration, and *four special pleas* to the first seven counts, alleging, in substance, that the judgment complained of, was obtained upon the ground, that in the sale of the cotton, the plaintiff had been guilty of *fraud*. Upon demurrer to these pleas, it was *HELD*, that there was nothing unlawful in the contract set forth in the declaration, and that the pleas were no answer to the second count. *Id.*

SPECIAL INTEREST.

See TROVER.

STATUTE OF FRAUDS.

See GUARANTY, 3.

STAY OF PROCEEDINGS.

See PRACTICE, 5.

STOCKS.

1. In order to charge a defendant, in an action for money paid for the purchase of stock on his account and by his order, the plaintiff must clearly show the authority under which he acted, and prove that he was instructed by the defendant to make the purchase. And where the proof was so defective, at the trial, that the jury would have been compelled to infer such authority from conversations and admissions of the defendant, which were neither explicit nor satisfactory, the plaintiffs were nonsuited and the court refused to set the nonsuit aside.

Ward v. Van Duzer, 162

2. At the time of the purchase of the stock by the plaintiffs, the persons with whom they contracted for its delivery had no stock standing in their names on the books of the corporation by which it was issued, and there was no evidence, that they were in fact the owners of the stock, which they professed to sell. It seems that the transaction was void under the act relative to stock-jobbing, and that the plaintiffs' action could not be sustained.

Id.

3. The defendant signed a subscription for a certain number of shares in the stock of the Morris Canal and Banking Company; which subscription was upon condition, that 3000 shares of the stock, then held by the Company itself, should be subscribed for within 90 days from its date; and this fact

was to be certified by at least two of the Directors, and by the Cashier of said Company. The President, Cashier, and two of the Directors signed the requisite certificate, and the defendant paid the first instalment on his stock. Refusing to pay the subsequent instalments, an action was brought against him upon his subscription ; and at the trial he offered to show that the 3000 shares of stock, mentioned in the agreement, had never been subscribed, as stated in the certificate, and that the persons who signed it, did so fraudulently, knowing it to be untrue.

This evidence was rejected by the presiding Judge, and the court granted a new trial, upon the ground that the testimony thus offered was admissible, the certificate itself, if false and fraudulent, being a mere nullity. *The Morris Canal Co. v. Nathan,* 239

4. A subscriber to the stock of an incorporated company, has, by the act of subscribing, such an interest in the stock of the company, as will furnish a sufficient consideration to support a promise on his part, to pay the amount of his subscription. And the remedy of the company for the non-payment of the instalments, duly called for, according to the terms of the subscription, is not confined to a *forfeiture* of the shares,—but they may maintain an action of *assumpsit*, upon the promise contained in the subscription, for the amount of the instalments. *Harlem Canal Co. v. Seixas,* 504
5. The subscriber, who pays the amount of his subscription, can compel the company to furnish him with a proper certificate of his stock ; and where by the terms of subscription, the first instalment was not to become payable, until a certain amount of stock was subscribed for, a call for the first instalment was deemed tantamount to a *notice* to the subscriber, that the requisite amount had been taken up. *Id.* See **CHARTER PARTY**, 1. **INSURANCE**, 1, 2.

STOCK IN TRADE.

See INSURANCE, 5.

SUBSCRIPTION FOR STOCK.

See PLEAS and PLEADING, 1. **Stocks**, 4, 5.

SUBMISSION TO ARBITRATION.

See AWARD, 1.

SUBSEQUENT PROMISE.

See INSOLVENTS' DISCHARGE, 5.

SUIT.

See CONSIDERATION, 3.

SUMMONS.

See DEBT ON JUDGMENT.

SURETY.

1. An *agreement for delay*, without consideration, made between the principal debtor and his creditor, will not discharge a surety. An agreement to have that effect must be a binding agreement, or one to the prejudice of the surety. *Hall & Moniross v. Constant.* 185
2. A *negotiation* for delay upon terms not finally accepted, does not discharge the surety, though there is actual delay ; there being no binding contract to prevent a suit against the principal at any time. *Id.*

See COVENANT, 1. **GUARANTY**. **PROMISSORY NOTES**, 4. **RESPONDENTIA**.

SURPLUSAGE.

See DAMAGES.

SURVEY OF VESSELS.

See CHARTER PARTY, 1. **INSURANCE**, 1, 2.

T**TENDER.**

When the plaintiff, by the terms of a contract for the purchase of goods, is to pay for them in his own promissory notes, at different dates, it is not necessary for him to aver in his declaration, (in an action for the breach of the contract,) a formal *tender* of the notes. It is sufficient if he allege his readiness to accept the goods and pay for them in the manner agreed upon.

While v. Demilt, 405

TITLE.

See SHIPS and SHIPPING, 1, 2, 4.

TORT.

See TRESPASS.

TRAVERSE.

See CHARTER PARTY, 2.

TRESPASS.

When trespass or trover will lie, if the wrong doer has converted the property into money, the plaintiff may waive the *tort* and bring assumpsit.

Sturtevant v. Waterbury, 449

See MONEY HAD AND RECEIVED, 1.

TROVER.

1. An officer who has levied an execution upon personal property, is not deprived of his special interest therein, by taking the bond or receipt of a third person, stipulating for its production on the day of sale; and, if forcible possession be taken of the goods by a wrong doer, the officer may maintain *trover* for them, founded upon his special interest.

Hankins v. Kingsland, 425

2. A conditional sale of goods, accompanied

by a delivery thereof to a third person, who is to hold the same, as the agent of the contracting parties, until the terms of sale are complied with, will not vest the property in the purchaser, until the condition precedent is fulfilled. *Van Buskirk v. Purinton & Colline,* 561

3. And where goods purchased conditionally, were put on board a vessel by such agent, with the intent, that when the condition precedent was complied with, the title thereto should vest in the purchaser, who had, by a charter party, agreed to furnish a cargo for the vessel to proceed to a foreign port; the seller was permitted to reclaim the property out of the hands of the ship owner and master, upon a failure, by the purchaser, to fulfill the precedent condition; although the defendants claimed to have a *lien* upon the goods for the *freight* specified in their charter party. *Id.*
4. A conditional sale of property, accompanied by a delivery of it to a *third person*, who is to hold the same, as the common agent of the contracting parties, until the terms of sale are complied with, will not vest the title to the property in the purchaser, until the condition precedent is fulfilled. *Collman et al. v. Collins,* 569
5. The plaintiffs, through B., an agent, agreed with R. & C., to advance a sum of money sufficient to cover the first cost of a quantity of turpentine, upon condition, that the turpentine, when purchased, should be shipped and consigned to them at London, "freight free," by the bills of lading. R. & C. acceded to the terms, and a quantity of turpentine was purchased by B., the agent, and R., one of the contracting parties, and put on board a ship which R. & C. had chartered of the defendants for a voyage to London and back. It was agreed between B., the agent, and R. & C., that the

turpentine should not become the property of the latter, until they had produced bills of lading therefor, signed, "freight free;" and upon these conditions, B., the agent, paid for the turpentine, with money received of the plaintiffs; put it on board the ship, taking receipts therefor, in his own name. The master of the vessel, with the approbation of the defendants, refused to sign bills of lading for the turpentine, "freight free," contending that they had a lien on it for the freight money mentioned in the charter party. The contemplated voyage was, by this means, broken up, and the defendants took the turpentine out of the vessel and sold it.

HELD, that R. & C., not having complied with the condition upon which the turpentine was to become theirs, had no title to the property; and as the plaintiffs had *paid* for the turpentine, and received possession of it through B., the agent, they were entitled to maintain *trespass* for the conversion of it by the defendants. *Id.*

HELD also, that the turpentine, under the circumstances of the case, was not put on board the ship under the charter party, and that the defendants, therefore, had no *lien* on the property for their *freight*. *Id.*

See TRESPASS.

TRUSTEES.

See ASSUMPSIT, 1, 2, 3. MORTGAGE OF CHATTELS, 4.

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UNSEAWORTHINESS.

See INSURANCE, 1, 2.

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USAGE.

See INSURANCE, 11.

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VARIANCE.

See CHARTER PARTY, 4.

VENDOR AND PURCHASER.

1. Where there is a mutual misunderstanding between the vendor and purchaser as to the *terms* of a sale, neither party is bound by the supposed agreement, there being, in such a case, no assent to the contract.

Mildeberger v. Baldwin & Forbes, 176

2. The plaintiff's factor sold goods to the defendants, to be paid for, as he understood the arrangement, in the note of a third person, payable at a future day, indorsed by the defendants; but as the defendants supposed, by the same note, indorsed without recourse to them. The goods being delivered, the defendants offered the note proposed to the factor, indorsed without recourse, which he refused to receive. The defendants kept the goods, and declined to make payment in any thing, but the note thus offered, and thereupon this action was brought to recover the value of the goods. The Judge charged the jury, that if there was a mistake between the parties in the first concoction of the contract, the one expecting to receive a note indorsed by the defendants absolutely, and the other to give it without recourse to them, as the defendants instead of returning the goods had appropriated them to their own use, they were bound to pay for them. A verdict having been found for the plaintiffs, this charge was held to be cor-

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rect, and the factor was held to be a competent witness for the plaintiff.

Id.

See WITNESS, 1.

VERDICT.

1. Where matters in controversy, between parties, have once been put in issue by them before a court of competent authority, and passed upon by that tribunal, in an action brought by the present defendant against the present plaintiff, the same matters cannot again be drawn into controversy in another action, in a different court, brought by the former defendant against the former plaintiff. *Smith v. Kelly,* 217

2. The defendant, in the former action, by submitting to the decision of the court in which it was brought, becomes bound by it; and he cannot cause the decision to be collaterally reviewed, by bringing an action against the former plaintiff. *Id.*

3. If the defendant, in the first action, feels himself aggrieved by the decision of the first tribunal, his course is to except to the opinion of the Judge, and cause his decision to be reviewed by a competent tribunal. If he acquiesce, however, in the decision, by not excepting to it, he is bound by it. *Id.*

See PRACTICE, 2, 5, 11.

4. The Judge, at the trial of the cause, without the consent of the defendants, and notwithstanding objections interposed by them, directed the jury, if they found for the plaintiffs, to find a nominal sum, sufficient to cover their demand, subject to a reference, to liquidate the accounts and ascertain the balance. HELD, that the Judge

had no power, without the consent of parties, to direct such a verdict, and that it must be set aside for irregularity. *Belden v. Davies,* 433

See AWARD, 5. EVIDENCE, 3. NEW TRIAL, 1.

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WAIVER.

See EVIDENCE, 4. INSOLVENTS' DISCHARGE, 7. TRESPASS.

WARRANT.

See DEBT ON JUDGMENT, 3.

WARRANTY.

See INSURANCE, 9, 10.

WIFE.

See HUSBAND and WIFE.

WITNESS.

1. A factor, who has made advances for his principal, although he has a general lien on the goods and the proceeds of the goods of his principal in his hands, as a security for his advances, is nevertheless a competent witness for his principal, unless he has a specific claim upon the subject matter of the controversy.

Mildeberger v. Baldwin & Forbes, 176

2. The plaintiffs, to rebut the evidence of a witness, introduced by the defendants, offered a bill in chancery, filed by him, which contained allegations contradictory to his testimony at the trial. The witness stated, that the bill had been filed by his *counsel*, and that he had never read it, although he believed that his counsel told him what

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he intended to insert in it; but the bill
was neither signed nor sworn to by the
witness. HELD, that the evidence *See PHYSICIAN. SHIPS and SHIP-*
thus offered was not admissible. *PING, 10.*

Belden v. Davies, 433

WORK AND LABOR.

*See COMMISSION. EVIDENCE, 1. NEW
TRIAL, 3. PLENE ADMINISTRAVIT.
PRACTICE, 7. VENDOR and PUR-*See ACTION ON THE CASE. TRES-*
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